

## Basic Legal Usage

**AFFIRM:** Precedent can be followed or overruled, but lawyers don't usually say that a precedent has been "affirmed." An appellate court "affirms" when it refuses to reverse the ruling of a lower court *in the same litigation*. See **OVERRIDE**.

**AND/OR** is both ambiguous and awkward. Instead, when writing about a situation where either *and* or *or* might be accurate, use *or* and add to your list an extra item that conveys the meaning of *and*:

<b>wrong:</b>	Under Rule 11 of the Federal Rules of Civil Procedure, sanctions can be imposed on the attorney and/or on the client.
<b>right:</b>	Under Rule 11 of the Federal Rules of Civil Procedure, sanctions can be imposed on the attorney, the client, or both.

**APPEAL:** The past tense is spelled *appealed*.

**ARGUE:** Lawyers argue, but courts do not. Argument is intended to persuade others. One argues when one lacks the power to decide, and one argues to those who have that power. A court "decides," "holds," "finds," "rules," "concludes," and so on. Individual judges might "argue," but only in dissent.

**FIND** and **FOUND:** When a court "holds," it settles a question of law, but when a court "finds," it decides from the evidence what the facts are. Conclusions of law are not "found."

**GUILTY:** A guilty defendant has been convicted, in a criminal prosecution, of committing a crime. Cases that end this way are captioned "State v. Smith," "People v. Smith," "Commonwealth v. Smith," or "United States v. Smith." If, in a *civil* case, Smith loses to a private plaintiff who wants money damages or an injunction or some other type of civil relief, Smith is *liable*. In a civil case, there is no such thing as guilt.

**HOLD:** See *FIND* and *SAY*.

**INNOCENT:** Despite what you hear on the evening news, defendants don't plead "innocent," and juries don't find them "innocent." In a criminal trial, the question is whether the prosecution has proved guilt beyond a reasonable doubt. If it has, the defendant is "guilty." If it has not, the defendant is "not guilty." The jury takes no position on whether the defendant is innocent. "Innocence" has little meaning in criminal law, which cares about whether guilt can be proved and not about whether defendants are guilty or innocent. When a defendant pleads "not guilty," the defendant does not claim to be innocent: instead, the plea is a demand that the government prove guilt beyond a reasonable doubt.

**IT**, when used as a referent, can cause vagueness. See *THIS*.

**JUDGMENT:** In legal writing, *judgment* is *always* spelled with only one *e*. In a general-purpose, Webster's-type dictionary, you can find "judgement" listed as an acceptable alternative spelling. But the type of judgment issued by a court is *always* spelled with only one "e" (see any *law* dictionary).

**MOTION**, in the procedural sense, is a noun, not a verb. A motion is a request for a court order or a judgment. To get an order or judgment, a lawyer "moves" or "makes a motion." A lawyer doesn't "motion for an order." (Like everybody else, a lawyer "motions" by making a physical gesture, such as when hailing a taxi.) And a lawyer doesn't "move *the court* for an order." In that phrase and others like it, "the court" is understood (and need not be stated) because only courts can grant orders. And to many readers, adding "the court" looks silly because it evokes other meanings. (For example: The judge wiped away a tear, and it was clear that the witness's story had moved the court. Or: "To what new location are we moving this court?" asked Hercules as he lifted the big granite building with the pillars in front.)

**OVERRULE** and **REVERSE** mean different things. On appeal, the judgment or order of the court below in the same case can be *reversed*, but a court *overrules* precedent created in a prior case. (In another context, *overrule* has an entirely different meaning: when a trial judge rejects an attorney's objection to something the opposing attorney has done, the objection is "overruled.")

**REVERSE:** See *AFFIRM* and *OVERRULE*.

**SAY:** Statutes don't *say* things, and courts *say* only in dicta. When a court "holds," it is doing and not merely talking, just as a legislature does when it *enacts* a statute. (In statutes, legislatures "provide," "create," "abolish," "prohibit," "penalize," "define," and so forth.) The verb "to hold" has synonyms—"to conclude," "to determine," "to decide," "to reason," "to define," etc.—but "to say" is not one of them. On the other hand, a judge writing a concurrence or dissent doesn't act for the court, and therefore can accurately be considered to *say* things.

**STIPULATE** is a term of art and means a formal agreement (or part of one) between the parties to a lawsuit. Judicial opinions cannot “stipulate” (although they might refer to stipulations made by the parties). Nor can statutes or lawyers’ briefs “stipulate.”

**THAT**, when used as a referent, can cause vagueness. See *THIS*.

**THE** is sometimes omitted by lawyers, but only before the following party designations: *plaintiff*, *defendant*, *appellant*, *appellee*, *petitioner*, and *respondent*. Much of the time you’ll appear more literate if you retain “the” even before party designations. It’s fine to title a document “Memorandum of Law in Support of Defendant’s Motion for Summary Judgment,” but inside the memorandum you’re better off writing “The defendant is entitled to summary judgment because the plaintiff has adduced no evidence that could show...”

**THE COURT:** In some students’ writing, “the court ruled in *Johanneson*...” will be followed by “the court ruled in *Di Prete*...,” even if *Johanneson* was decided by the United States Supreme Court and *Di Prete* by a county trial court. Because opinions are printed in law school casebooks and discussed in law school classrooms without any differentiation within the hierarchy of authority (see Chapter 7), students are sometimes led into the habit of writing as though there were only one court in the entire common law world.

**THIS** and other referents (*IT*, *THAT*) are vague unless the objects or ideas they refer to are immediately clear to the reader. For example:

On September 9, the supplier threatened to withhold deliveries to the manufacturer, which purchased elsewhere at higher cost. The supplier then notified the manufacturer’s own customers of the situation. *This* caused the damages for which the manufacturer now seeks recovery.

To what does “this” refer? The communication to the customers? The threat? The timing of the threat? The entire pattern of behavior? How could the meaning be made more clear?

**VERBAL** is not a synonym for “oral.” “Verbal” means “having to do with words”—both spoken and written. A “verbal communication” is one that was made in words and not through gestures and shrieks. An “oral communication” is a spoken one, rather than one made in writing. In popular usage, *verbal* has been used so often as a synonym for “oral” that general-purpose dictionaries have come to accept that usage as an alternative (but not favored) meaning. But law needs clear ways of differentiating between the written and the spoken word and between communication through words and communication through other means. If you’ve learned about the parole evidence rule and the Statute of Frauds in Contracts, you have begun to appreciate how critical the differences between written and oral communication can be and how often lawyers must talk about them. Because of the importance those differences are accorded in law, legal usage of *verbal* hasn’t evolved in the

same way that popular usage has. A lawyer who tells a judge that the parties made a “verbal” contract is apt to be interrupted with a question like “Counselor, do you mean they made an oral contract? Or do you mean that this is a contract expressed in words and not an implied contract inferable from the parties’ conduct?”

**WHEN** and **WHERE** aren’t used to set out definitions.

**wrong:** Burglary is *where* [or *when*] the defendant breaks and enters the dwelling of another, in the nighttime, to commit a felony therein.

**right:** Burglary is the breaking and entering of the dwelling of another, in the nighttime, with intent to commit a felony therein.