



Tricky Diction

Word choice can be tricky. Sometimes we confuse homophones—words that sound alike but that have different functions or meanings. Sometimes we stumble over words that have a similar meaning but different usage. Smart, well-read writers and lawyers misstep all the time. This month, I provide a handful of quick tips to help you dodge three common diction pitfalls.

Passed / past

We all passed the bar exam. Now the bar exam is in the past.

Passed plays the narrower role: It is simply the past participle of the verb “to pass.” For example:

- The defendant passed the joint to the undercover officer.
- Jerry passed the school on his way to work each day.

Past, on the other hand, can be an adjective, adverb, noun, or preposition, and it locates something in time or space:

- The past three weeks have been crazy. (as adjective)
- As we stood in front of the school, Jerry rode past. (as adverb)
- Let’s not discuss what’s in the past. (as noun)

- Jerry walked past the school on his way to work every day. (as preposition)



Moose lying down

Less / fewer

The defendant obtained fewer citations—and less jail time—because Kevin represented him so well.

Some people cite the following rule for when to use *less* and when to use *fewer*: Use *fewer* for items that you can count:

- Moose chews fewer shoes than he did when he was a puppy.
- When the police searched the yard the second time, they found fewer potted plants.

Use *less* for items that you cannot count:

- Moose chews less furniture than he did when he was a puppy.
- The bartender noticed that the bottles contained less alcohol than they had when he closed the bar the night before.

This trick works most of the time, but time, money, distance, and weight are exceptions to the general rule. You can count dollars, hours, miles, and ounces, but you still use *less* to talk about them because we generally think of them as a mass. For example:

- The defendant allegedly stole less than \$1,000.
- The drugs weighed less than 400 pounds.
- Writing that brief should take less than 10 hours.

Grammar Girl (citing the *Chicago Manual of Style*) posits a tidier rule: Use *fewer* for things that we think of as plural and *less* for things we think of as singular.¹ You wouldn’t say “\$1,000 are a lot of money,” so you don’t say “The defendant allegedly stole fewer than \$1,000.”



Susie Salmon

Susie Salmon is Assistant Director of Legal Writing and Associate Clinical Professor of Law at The University of Arizona, James E. Rogers College of Law. Before joining Arizona Law, she spent nine years as a commercial litigator at large firms in Tucson and Los Angeles.

Lay / lie

I lay the half-finished brief on the table and lie on the floor of my office.

I saved the trickiest one for last. We will set aside the meaning *to tell an untruth*—although that usage certainly pops into legal writing now and then—and focus instead on the meanings of

place or *recline*.

To use *lay* and *lie* correctly, remember that, in the present tense, to *lay* means to place. Furthermore, as a transitive verb, *lay* requires an object. For example:

- According to the police report, four witnesses saw the defendant lay the unconscious victim on the ground.
- The officer yelled, “Lay the gun down immediately!”

Lie, on the other hand, means recline. And, as an intransitive verb, it requires no object:

- According to the police report, four witnesses saw the defendant lie on the asphalt with his hands behind his head.
- The officer yelled, “Lie on the ground!”
- Please go lie in your crate, Moose!²


In truth, though, I always remember it this way: We lay things (or other people³). We lie (to) ourselves. Easy peasy, right?

Now I will ruin everything. Lawyers often do not write in the present tense. The events we litigate already happened, and the facts, holdings, and rationale of the cases we cite happened even earlier. Thus, you most often use the past tenses of *lay* and *lie*. But guess what? **The past tense of lie is lay.**

Oh, no.

Worse yet, I do not have a helpful, slightly racy trick to remember the other tenses. Instead, use my trick to identify the correct present tense usage, and then either memorize this list or post it over your desk:

- Lay, is laying, laid, has laid
- Lie, is lying, lay, has lain

Most of us have word-choice quandaries that quite literally give us pause as we fumble for the right choice. I hope that this column provides some tricks, rules, and guidelines that eliminate some of that hesitation. Look for another column on diction issues in future months. If you have a question or debate that you would like to see me address, please let me know! 

endnotes

1. www.quickanddirtytips.com/education/grammar/less-versus-fewer
2. This is the most common usage in my world.
3. What?