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Apostrophic Apotheosis: Whose fees are they, anyway?

“Is the proper term ‘attorney fees,’ ‘attorneys fees,’ ‘attorney’s fees,’ or ‘attorneys’ fees?’” The next time you’re struggling with if and where to use an apostrophe, know that your fellow appellate geeks are there behind you, urging you to make the right choice.

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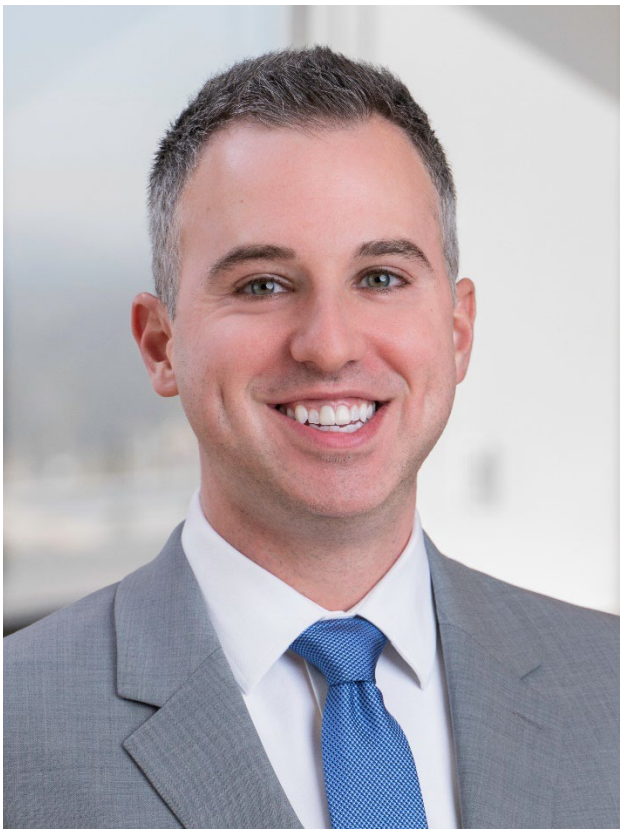

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Appellate lawyers are stereotypically obsessed with obscure (read: nerdy) issues. These can include the number of spaces after a period, whether to italicize the period after "*id.*" (yes) or the comma after "*see, e.g.*," (no), whether to use an oxford comma, and whether to use the hyphen or en dash for page reference citations (the latter is technically correct, but the former reduces word count). But appellate lawyers (and judges) don't corner the market on a fascination with minutiae of legal writing.

Just last month, Magistrate Judge Andrew Edison of the Southern District of Texas solidified his bona fides as "one of those sorts," i.e., obsessed with writing style, by penning a lengthy footnote (of course it's a footnote!) addressing "one of the burning legal questions of our generation … that has kept [him] up many a night." *Estate of Gentry v. Hamilton-Ryker IT Solutions, LLC*, No. 3:19-CV-00320, 2023 WL 5018432, at *1 n.2 (S.D. Tex. Aug. 7, 2023). What was that incendiary issue?

In footnote 2 of a Memorandum And Recommendation, Judge Edison asks: "Is the proper term 'attorney fees,' 'attorneys fees,' 'attorney's fees,' or 'attorneys' fees?'" Judge

Edison acknowledges he isn't the first judge to grapple with this thorny grammatical quandary. Sixth Circuit Judge Danny Boggs waxed eloquent on it as early as 1997, in *Stallworth v. Greater Cleveland Regional Transit Authority*, 105 F.3d 252, 253 n.1 (6th Cir. 1997), noting that "[i]n federal statutes, rules and cases, we find these forms used interchangeably, nay, promiscuously" (revealing that Judge Boggs eschews the oxford comma). Judge Boggs offered a concise primer, but expressed no opinion on which form was correct. Instead, he opted to use "attorney fees" simply because that was the precise term used in the particular statute under examination.

Judge Edison similarly finds no clarity from his own Fifth Circuit, which has noted "[t]here are at least eleven competing terms [it] could use instead of 'attorney fees.'" *See Gahagan v. U.S. Citizenship & Immigr. Servs*., 911 F.3d 298, 300 n.1 (5th Cir. 2018). Nor did he find help from the Federal Rules of Civil Procedure, which uses both "attorney's fees" and "attorneys' fees." *Compare* Fed. R. Civ. P. 54(d)(2) (discussing the award of attorney's fees), with *id*. advisory committee's note to 1993 amendment (discussing the award of attorneys' fees). Congress offered Judge Edison no direction either. *See* 28 U.S.C. § 1927 (authorizing an award of "attorneys' fees"); *id*. § 1447 (authorizing an order remanding a case to award "attorney fees"); 29 U.S.C. § 216(b) (authorizing an award of "attorney's fees").

Judge Edison next turns to the United States Supreme Court's Style Guide, which instructs: "Use the singular possessive case 'attorney's fees' (not 'attorneys'') in the term 'attorney's fees,' even though in the particular case more than one attorney may be involved." Off. of the Rep. of Decisions, The Supreme Court's Style Guide § 10.3 (Jack Metzler ed., 2016). Despite this seemingly unambiguous guidance, however, Judge Edison notes that the Justices themselves still use the forbidden term "attorneys' fees." *See CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 110 (2012) (Ginsburg, J., dissenting). In any event, Supreme Court style—either from the Court's Reporter of Decisions or the Solicitor General's office—is often "unique" and not accepted as standard elsewhere (e.g., citation formats like "123 U. S. 456" and "123 F. 4th 456 (CA9 2021)").

Judge Edison next turns to renowned legal lexicographer Bryan Garner. The highly regarded and highly opinionated Mr. Garner has this to say:

Attorney's fees; attorneys' fees; attorney fees; counsel fees. The first of these now appears to be prevalent. *See* Attorney's Fee Act, 42 U.S.C. § 1988 (1988). The plural possessive *attorneys' fees* is just as good, and some may even prefer that term in contexts in which there is clearly more than one attorney referred to. *Attorney fees* is inelegant but increasingly common. It might be considered a means to avoid having to get the apostrophe right. (But cf. the phrase *expert-witness fees*.) *Counsel fees* is another, less-than-common variant.

The only form to avoid at all costs is **attorneys fees*, in which the first word is a genitive adjective with the apostrophe wrongly omitted.

Bryan Garner, Garner's Dictionary of Legal Usage 94 (3d ed. 2011) (note that Garner uses an asterisk to convey "invariably inferior form").

Judge Edison concludes that he will use "attorney's fees" to refer to fees sought by one lawyer and "attorneys' fees" to refer to fees sought by more than one lawyer, and will eschew entirely "attorney fees" and "attorneys fees."

While all this may seem to be reasonable, and with all due respect to Magistrate Judge Edison, Bryan Garner, and the rest who have tackled the issue, lawyers practicing in California's courts need not enter the fray. California has its own rule, and as is so often the case, California goes its own way. Section 4:60[A] of the California Style Manual—a.k.a. the Yellow Book—instructs:

"The term "attorney fees" is preferred, but "attorney's fees" or "attorneys' fees" may be used at the author's discretion. Whichever term is used, consistency within the document is required."

Style guides from other states concur with this. *See, e.g.*, Ohio Supreme Court Writing Manual, p. 117 (2d. 2013) ("Use *attorney fees*, not *attorney's fees* or *attorneys fees*."); Oregon Appellate Courts Style Manual, p. 78 (2023) (do not use apostrophe with "attorney fees"); North Carolina Appellate Style Manual, p. 91 (2021) (using "attorney fees"); *but see* House Style Guide: Arkansas Supreme Court and Court of Appeals, p. 58 (2022) ("*Attorney's fee(s)* is preferred.").

California Court of Appeal opinions naturally and generally follow the Yellow Book's stated preference. For instance, the recently published *Lee v. Cardiff*, No. A163817, 2023 WL 5170440 (Cal. Ct. App. June 13, 2023), used "attorney fees," deviating only when citing the statute at issue ("attorney's fees") or quoting the trial court's ruling ("attorneys' fees"). The same day *Lee* was certified for publication, another Court of Appeal followed suit, using "attorney fees" except when quoting statutes and rules. *Nachtrieb v. County of Orange*, No. G060294, 2023 WL 5162168 (Cal. Ct. App. Aug. 11, 2023). As if to highlight the issue, the first line of *Nachtrieb* is: "This appeal and cross-appeal challenge the trial court's award of attorney fees based on the federal Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988)."

California's rules and statutes are not a model of consistency, nor do they uniformly adhere to the Yellow Book. California Rule of Court 3.1702 "applies in civil cases to claims for statutory attorney's fees and claims for attorney's fees provided for in a contract" and is titled "Claiming attorney's fees." Yet Los Angeles County Superior Court Rule 3.207 is titled "Attorneys' Fees and addresses "the recovery of reasonable attorneys' fees."

The familiar Civil Code § 1717 addresses prevailing party "attorney's fees," and so does California's adoption of the Uniform Trade Secrets Act, Civ. Code § 3426.4 ("Awarding attorney's fees and costs") and California's Automobile Sales Finance Act, Civ. Code § 2983.4 ("Prevailing party's right to attorney's fees and costs"). Yet Civil Code § 3306a, which addresses damages for breach of an agreement to execute and deliver a quitclaim deed, provides that expenses "shall include reasonable attorneys' fees."

Code of Civil Procedure § 386.6 follows the Yellow Book and addresses "Costs and attorney fees" arising from actions in Interpleader. *See* Code Civ. Proc. § 386. But Code of Civil Procedure § 482.110 applies to writs of attachment and states that "the amount to be secured by the attachment may include an estimated amount for costs and allowable attorney's fees." And Code of Civil Procedure § 871.11, enacted just two years ago, is titled "Attorneys' fees" and sets limits on the award of "reasonable attorneys' fees to a prevailing party" in "any action to recover COVID-19 rental debt."

Is there a "right answer"? Grammar police would insist so, but normal people would ignore the question, let alone the answer, and focus on something more substantive. Regardless of whether one is an aficionado of Mr. Garner's, or of Judge Boggs' approach, or has one's own grammatical preferences, the safest bet in California is to follow the Yellow Book's advice and use "attorney fees"—and be consistent about it. Another guidepost in this direction is Richard Pearl's esteemed CEB practice guide, titled California Attorney Fee Awards (CEB 3d ed. 2023). Other secondary sources include Alba Conte's Attorney Fee Awards (West 3d ed.), Derfner & Wolf's Court Awarded Attorney Fees (Matthew Bender). *But see* Robert Rossi's Attorneys' Fees (West 3d ed.).

The topic of apostrophe placement arises in other contexts as well, similarly confounding. Would you write "Don't forget to take your driver's license to the farmer's market?" Heavens, no!

Although the card in your wallet reads "California Driver License," it does not appear that the California Supreme Court has used this phrase since 2016. *See People v. Clark*, 63 Cal. 4th 522, 543 (2016) (using both "fraudulent driver's license" and "fraudulent driver license," and noting the police search found "a California driver license"). On occasion, the high court has adopted the possessive apostrophe based on the number of licenses at issue. *See, e.g.*, *People v. Peterson*, 10 Cal. 5th 409, 423 (2020) ("two drivers' licenses"), 426 ("his brother's driver's license"). Either strategy seems sensible, and both avoid the dreaded "drivers license," which would spark Mr. Garner's ire as "a genitive adjective with the apostrophe wrongly omitted."

Only a handful of cases discuss the periodic gathering of local agricultural entrepreneurs, and most use the plural possessive. *See, e.g.*, *Shulman v. Group W Prods., Inc*., 18 Cal. 4th 200, 220 n.5 (1998) ("Los Angeles Farmers' Market"). The official name of the Third and Fairfax site in Los Angeles is The Original Farmers Market. *See also Richard M. v. Superior Court*, 4 Cal. 3d 370, 373 (1971) (noting the theft of a motorcycle from a

Farmers Market). Many style guides declare this correct, because a farmers market is a place where farmers convene, not a place that farmers possess. The AP Stylebook explains that an apostrophe usually is not used for descriptive phrases, i.e., if *for* or *by* (rather than *of*) would be appropriate in the fully spelled out form; hence, Dodgers pitcher, teachers college, and writers guide.

The careful lawyer and judge—appellate or not—should care about the writing style used in a brief or opinion simply as a matter of striving to produce an excellent product. After all, the written word is essential to the law, its enforcement, and its practice. So the next time you're struggling with if and where to use an apostrophe, know that your fellow appellate geeks are there behind you, urging you to make the right choice—or at least deeply considering the issue.