

Chapter 12

AVOIDING AMBIGUITIES

The *Oxford American Writer's Thesaurus* provides a number of synonyms for the word "ambiguous" reflecting how this word is often used colloquially. These include "open to debate/arguable," "abstruse," "dubious," and others. In drafting, however, the term is used in its formal, logical sense. That is what this chapter is about.

A. DEFINITION

"Ambiguity" means capable of having two or more distinct and mutually inconsistent meanings. An ambiguous term can either mean one thing or it can mean another thing, but it cannot mean both.

Although the two terms are often used interchangeably, ambiguity is distinct from vagueness, which merely means that the term in question has indistinct borders. A "reasonable time" is vague, because the two points that bracket a "reasonable" time (with "unreasonably" short on one side and "unreasonably" long on the other) are both uncertain and will have to be determined by the particular circumstances. But it unambiguously refers to times somewhere between the uncertain lower and upper limits of what is "reasonable"; it does not refer to any times beyond them.

B. THE CONSEQUENCES OF AMBIGUITY

Ambiguity is the greatest cause of litigation over drafted documents and litigation is always expensive, whether one wins or loses. The results of ambiguity-based litigation are

always bad for someone. An ambiguity could be fatal to the efficacy of the document, rendering a contract or statute void and totally frustrating the objectives of the contracting parties or a legislative body. Or, the court might construe the ambiguity against the drafter, causing the client serious disadvantage and opening the door to a malpractice action. If the ambiguity was a deliberate contrivance to deceive, the drafter may also be guilty of an ethical violation. Ambiguity is fundamentally inconsistent with the central mission of drafting, which is to avoid problems without the need for expensive and often unsuccessful litigation.

Consider two possible litigation scenarios involving an ambiguous term. The contract is for the sale of goods to arrive on the ship *Peerless* from Bombay. Clearly, the parties have in mind one particular ship. But, unbeknownst to either party, two ships named *Peerless* are scheduled to sail from Bombay at different times. The term *Peerless* has two mutually inconsistent meanings and is, thus, ambiguous. The buyer, moreover, knows only of the October *Peerless*, and the seller knows only of the December *Peerless*. The ambiguity, combined with the different meanings that the parties attached to the term, would defeat the existence of a contract based upon the doctrine of mutual mistake. The drafter's fault, although perhaps understandable, consists of a failure to investigate sufficiently the facts surrounding the transaction and to identify which ship *Peerless* was meant, perhaps by specifying its sailing date.

But suppose the buyer knows that two ships *Peerless* exist. The buyer still intends the October *Peerless* and knows or has reason to know that the seller thinks only one ship *Peerless* exists, the one sailing in December. The buyer's attorney, aware of all this, nevertheless drafts the contract in terms of the ship *Peerless*, without qualification. Although the ambiguity still exists, in this instance it will probably be resolved under the doctrine of unilateral mistake against the buyer, who will be bound to a contract for the goods arriving on the December *Peerless*.

C. TYPES OF AMBIGUITY

There are three types of ambiguity that may infect a document: contextual ambiguity, semantic ambiguity, and syntactic ambiguity.

1. Contextual Ambiguity

Contextual ambiguity exists when one allegedly controlling provision is inconsistent with another allegedly controlling provision. An internal contextual ambiguity exists when the inconsistency is within the contract or statute itself. Consider the two following provisions in a lease:

3. **Security Deposit:** Within 30 days after the termination or expiration of the lease, landlord will return the security deposit, less any amount owed for damage to the premises caused by tenant.

28. **Unpaid Rent:** At the termination of the lease period, landlord may apply the security deposit to any rent then owed by tenant.

A reasonable interpretation of the security deposit provision would be that, subject to the landlord being entitled to withhold only any amount that is due for damages to the premises, the entire amount must be returned. That interpretation, however, is negated by the unpaid rent provision, which allows the landlord to also use the security deposit to cover rent still owed.

Faulty definitions are another common source of internal contextual ambiguity. An insurance policy that defines both "building" and "business personal property" as including machinery and equipment is ambiguous if the two classifications have different and mutually inconsistent legal consequences, such as deductibles or limits of liability, with respect to the items that are included.

Some contextual inconsistencies, however, are more subtle and are often the result of poor conceptualization. The Civil Rights Act of 1964 contains the following definition:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, [1] because of or on the basis of pregnancy, childbirth, or related medical condi-

tions, and [2] women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, . . . (Bracketed numbers added)

Congress apparently did not have a clear idea of what it intended to prohibit. Phrase [1] imposes an unequivocal prohibition against discrimination because of pregnancy, but phrase [2] requires only equal treatment. Those are not equivalents and are, indeed, potentially inconsistent. Suppose an employer has a policy of not hiring persons who will need significant leave time during the first year of their employment. Under this policy, the employer has declined to hire persons who anticipate having major surgery during the first year. When the employer declines to hire a pregnant woman under this policy, that decision is clearly because of her pregnancy, but it is also equal treatment. Which prevails? The Supreme Court ultimately resolved the ambiguity in favor of the second phrase. But that expensive litigation could have been avoided if the drafter had conceptualized the prohibited conduct better and characterized it in a single, unambiguous way.

References to other documents can also create a form of contextual ambiguity. A general contractor agrees to remedy "all the itemized defects per owner's punch list of 9/2/06." If two lists of that date exist, containing a materially different itemization of defects, this creates an ambiguity. To avoid this ambiguity, the referenced document should be physically attached to the agreement. Even if only one other document exists, physical attachment will prevent this other document from getting lost, creating not an ambiguity but a void.

Statutes that incorporate by reference portions of other statutes run a high risk of contextual ambiguity. First, since the incorporated material was probably not intended to focus on the specific problem now being legislated, a perfect fit between the incorporating and the incorporated materials is highly unlikely. Conflicting implications frequently arise. Second, when the material incorporated by reference is later repealed or amended, the effect of this on the incorporating

legislation is unclear. A statute in the Virgin Islands poses a similar problem. In 1921, the legislature adopted as the common law "the restatements of the law prepared and approved by the American Law Institute." The reference in 1921 was implicitly to the first Restatement, with a contextual ambiguity arising when the Restatement (Second) came out.

An external contextual ambiguity arises when the inconsistency is between what one contract or statute says and what another contract or statute says. For example, a client asks the drafter to prepare a contract for the purchase of a house and specifies the terms and conditions. The drafter fails to discover that the client already has a lease on the house and that it contains an option to buy, albeit on different terms. Which document controls? Similarly, the legislative drafter who does inadequate research may draft a statute that appears to require what another statute prohibits, creating an ambiguity.

2. Semantic Ambiguity

Semantic ambiguity arises out of the use of specific words and phrases. The following categories of words are among the most troublesome.

a. Homonyms. Words that are spelled the same but have different meanings can sometimes cause confusion in drafted documents. The word "bar," for example, could refer to a place where drinks are served, a device to secure a door, something used to pry objects loose, something every lawyer must pass, what lawyers practice before, or a measure of music. Usually, the context will inform the reader of the intended meaning of a homonym, as in that example. But some words with multiple and mutually inconsistent meanings cannot be resolved by context. The drafter should be especially aware of the following words and expressions:

- **Doctor.** This could refer to a Ph.D., an M.D., a D.M.D., a D.V.M., or an LL.D. The difference could be rather important if the document is identifying the qualifications of persons eligible to hold a particular position.

- **Public.** When used in reference to a place, this may mean a facility that is governmentally owned, a place that is accessible without restriction, or a place that can be readily seen by other persons. A reference to a public parking lot or a prohibition against doing something in a public place may be ambiguous.
- **Residence.** This could refer to one's legal domicile (for voting or tax purposes) or one's place of abode at any given time.
- **Sanction.** This can mean either an approval or a penalty. To refer to "conduct sanctioned by the legislature" is thus ambiguous.
- **Since.** This word can be used both to express a causal relation and to indicate the passage of time. A recital in a contract might state, "Since the seller defaulted on the prior contract, buyer has begun manufacturing its own bolts." This could indicate when the buyer began to manufacture its own bolts or it could indicate why. To avoid this ambiguity, some drafters limit "since" to its temporal connotation and use "because" to indicate causation.
- **While.** Similarly, the word "while" can be used to express a time period or to mean although. Assume that a contract modification stipulates as follows: "While the delivery date of June 19, 2004, is suspended due to the Canadian embargo, buyer shall not attempt to obtain goods from another source." The "while" could either mean "during the time that" or "although." Because of this potential for ambiguity, the preferred usage of "while" is in its temporal sense. And the drafter should also make sure that this is clear from the context.

b. "And." This word can mean either jointly or severally. For example, if a contract says, "Executor shall distribute \$1,000 to Bill and Mary," this could mean that they must share the \$1,000 jointly. Or it could mean that each of them separately gets \$1,000. The drafter should choose between the following, depending on the testator's intent:

Executor shall distribute \$1,000 to Bill and Mary, to be shared jointly.

Executor shall distribute \$1,000 each to Bill and Mary.

The use of “and” following a preposition can also cause significant problems. Suppose Bill and Mary were once married and had children; they have since divorced and remarried and both have children by the second marriage. What does “To the children of Bill and Mary mean?” It could refer only to the children of their union. Or it could also include the children of their second marriages.

Ambiguity may arise when the reader cannot determine from context whether the “and” is intended to identify several different entities or to identify the traits of a single entity. This is especially true when the “and” phrase includes modifiers. The classic example comes from a will litigated in 1799, where the testator bequeathed to a particular individual, “All my black and white horses.” He died leaving six white horses, six black horses, and six horses with both black and white colors. Which horses should the beneficiary inherit?

Similarly, a document might refer to “charitable and educational institutions.” Does this mean to institutions that are both charitable and educational? Or does it refer to two entities, charitable institutions and educational institutions? The drafter can avoid this ambiguity by referring to “institutions that are both charitable and educational,” to “institutions that are either charitable or educational,” or to “institutions that are charitable, educational, or both.”

An ordinance might provide that “Every owner and operator of a taxicab shall report annually.” Does the ordinance apply to a single entity, namely someone possessing both the trait of being an owner and the trait of being an operator? Or does it apply to two classes of entities, persons who are owners and persons who are operators? Or does it apply to three classes of entities, owners, operators, and persons who are both an owner and an operator? Depending on what is meant, the ambiguity could thus be resolved as follows:

*A person who is **both the owner and operator** of a taxicab shall report annually.*

*A person who is the **owner** of a taxicab and a person who is the **operator** of a taxicab shall report annually.*

*A person who is the **owner** of a taxicab, a person who is the **operator** of a taxicab, or person who is **both the owner and operator** of a taxicab shall report annually.*

Sometimes drafters intend to use “and” in the disjunctive rather than the conjunctive sense, although this can only be determined from the context, which thus makes it ambiguous.

Bill and Mary are entitled to exercise the option to repurchase the land.

Obviously, Bill and Mary cannot each separately exercise the option. But the sentence could mean that they must do it jointly or it could mean, construing “and” to mean “or,” that either one of them can do it—presumably, whoever acts first. Depending on what the client intends, the drafter could draft it in one of the two following ways:

Bill and Mary are entitled to exercise the option jointly.

Either Bill or Mary is entitled to exercise the option.

c. “Or.” The word “or” can have an exclusive connotation, meaning “A or B, but not both.” It can also be used in an inclusive sense, meaning “A or B, or both.” Suppose a criminal statute imposes a penalty of “a \$500 fine or ten days in jail.” Does this mean that the judge can impose the fine or the term in jail, but not both? Or can the judge impose both? Or suppose a will states, “The Executor is authorized to sell my jade collection in New York or Chicago.” Does this mean that the executor must choose between the two cities? Or may the executor sell parts of the collection in both cities?

Although a simple “or” is usually construed in its inclusive sense, the drafter should make this clear. Say “\$500 or ten days in jail, or both.” If the disjunctive is intended, say “either \$500 or ten days in jail, but not both.”

Drafters sometimes intend to use “or” in its substitutionary sense, creating further uncertainties. If a will provides, “To Bill or his heirs,” an executor or court would construe this as meaning that the bequest goes to Bill’s heirs, but only if Bill is not alive, since Bill cannot have heirs until he is dead. Here, the substitutionary sense of “or” can be determined from the factual context. But what if the will

provides, "To a non-profit corporation devoted to the restoration of 18th Century homesteads, if one exists, or to the Texas Historical Foundation." Is this "or" being used substitutionally or alternatively? When "or" is used in its substitutionary rather than alternative sense, make this clear.

To Bill, or if Bill is not alive at the time of my death, to his children.

A related ambiguity exists when "or" is used to connect classes of entities from which a selection is to be made. For example, a contract might provide, "Seller shall ship 1,000 red or blue widgets." If it is important to the buyer that all the widgets come from the same color class, then the contract should make that express by requiring the seller to ship "either 1,000 red widgets or 1,000 blue widgets." Otherwise, the seller might feel free to ship 500 of each color.

d. "And/Or." "And" is generally inclusive. To draw on tort language, it is joint and several. "And" can mean A and B, together (jointly), and each separate and apart (severally). But there are times when "and" needs to be restricted to its joint sense (when "A and B" means only both together). "Or" can be exclusive (A or B but not both) or inclusive. See *Am. Surety Co. v. Marotta*, 287 U.S. 513, 53 S.Ct. 260, 77 L.Ed. 466 (1933) (holding that "or" includes "and"); 11U.S.C. § 102(5) (accord). Since both "and" and "or" are potentially ambiguous, combining them into one term only multiplies the ambiguity. Because of this, "and/or" has been the subject of considerable judicial hostility. One judge expressed it this way:

It is manifest that we are confronted with the task of construing "and/or," that befuddling, nameless thing, that Janus-faced monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interests of their clients.

Judges have also called "and/or" (1) "a mongrel expression," (2) "a meaningless symbol," (3) "a weasel phrase," (4) "a verbal monstrosity," (5) "one of those inexcusable barbarisms which was sired by indolence and damned by indifference," (6) "an abominable invention," (7) "as devoid of meaning as it is incapable of classification by the rules of grammar and syntax," and (8) "a hybrid, contradictory combination, frequently as bewildering, mystifying, and perplexing as Poe's raven—or was it fiend? on the 'night's Plutonian shore.' "

The outrage is fully warranted. Suppose a contract provides a sales commission for "transactions originating and/or consummated within the Columbia city limits." Construed inclusively, the "or" component suggests that the commission is due if the transaction originated in Columbia, was consummated in Columbia, or both originated and was consummated in Columbia. If the "and" is construed as referring to two entities with separate characteristics, that reaches almost the same result—although to be fully consistent it would have to also be construed as encompassing a third entity possessing the characteristic of both being originated and consummated in Columbia. On the other hand, if the "or" is construed in its disjunctive sense and the "and" is construed as referring to a single entity with two characteristics, then the result mandated by the "or" is inconsistent with the result mandated by the "and."

The same ambiguity exists in a statute that says, "Any person found guilty of operating a motor vehicle while in an intoxicated condition and/or who shall cause injury to person or property shall be guilty of a felony." The "and" component suggests that this is a single offense consisting of two elements, intoxication and causing injury. The "or" suggests that the statute defines two possible offenses, intoxication and causing an injury.

The dwindling remnant of drafters who defend the use of "and/or" contend that it is a concise way of saying "A or B or both." Certainly, that is one way that it can be construed. But since there are also other ways it can be construed, the phrase remains fatally ambiguous despite their protestations. Moreover, in most cases where an "and/or" is used, a simple "or" would suffice since it is usually

construed in its inclusive sense. A reference to a person who is "a citizen at or over the age of 21" would not be construed as excluding a citizen over the age of 21.

Often, drafters will fail to indicate whether the items in an enumeration or list are cumulative or alternative.

An employee may be allowed up to 30 days unpaid personal leave each calendar year if—

(a) The employee requests the leave in writing at least 7 days in advance;

(b) The reason for the leave could not have been anticipated at the time the employee took his or her regularly scheduled vacation.

The provision implies "and/or," making it just as ambiguous as if the term were express. Does this impose two requirements? Or does (b) operate as an exception or alternative to (a)? The implied, or silent, "and/or" in an enumeration should be changed to "and" or "or," depending on what the client intends.

A partial solution may be the use of "and" only jointly, "or" only severally, and "and/or" to indicate joint and several relationships. This could be accomplished by use of a provision defining the terms. This would require one to carefully and consistently use the defined terms appropriately. Because 100% consistency is the exception rather than the rule, this may be unworkable in the rigors of actual practice. One can also use constructions such as "A or B or both," "A or B but not both," or "A and B together but not separately" and the like. Confront this issue, adopt a workable solution, and apply it uniformly to your drafting.

e. Specific Dates. Drafters use a variety of expressions in reference to specific dates. Some are clear. But some have been construed in different ways. Others have a legal meaning that is inconsistent with the conventional meaning.

● **"Between . . . and . . ."**

*Buyer may exercise the option **between** July 1, 2009, **and** July 29, 2009.*

The courts generally construe this literally. Thus, the option could not be exercised on either of those two dates, only in

the period between them. However, that construction is inconsistent with how many lay persons would construe the language, namely including the two dates and the period between the dates.

- “By ...”

*Buyer must exercise the option **by** July 29, 2009.*

Most courts hold that the option may be exercised on that date, but the matter might be worth litigating if a great deal of money was at stake.

- “From ... to ...”

*Buyer may exercise the option **from** July 1, 2009, **to** July 29, 2009.*

Some courts hold that the option can be exercised on neither date. Some courts hold that the “from” date is excluded but the “to” date is included. Some courts hold that both dates are included.

- “Until ...”

*Buyer’s option is open **until** July 29, 2009.*

Most would hold that the option can be exercised on that date.

Because all of these date-related phrases have been variously construed and are thus ambiguous, the drafter should avoid them. Usually, they can be replaced with a set of terms that are generally regarded as not being ambiguous, whether they are used together or individually, as follows:

- “After ... before ...”

*Buyer may exercise the option **after** July 1, 2009, and **before** July 29, 2009.*

*Buyer must exercise the option **after** July 1, 2009.*

*Buyer must exercise the option **before** July 29, 2009.*

Courts hold that the option may not be exercised on either date. Many, however, find it counter-intuitive to specify in a document a date that is not included in the allowed time period. To accommodate both legal and conventional understandings, many drafters use “on or after” and “on or before” terminology.

*Buyer may exercise the option **on or after** July 2, 2009, and **on or before** July 28, 2009.*

Indeed, since “on” is fairly consistently construed to include the full day referenced, many drafters are content to use it in lieu of any “after . . . before” expression.

*Buyer’s option begins **on** July 1, 2009, and ends **on** July 29, 2009.*

Drafters exercising extreme caution would also include the times, at “12:01 a.m.” and “at 11:59 p.m.”—or some other times, if desired.

f. Time Spans. Drafted documents often refer to time spans rather than specific dates. Precisely measuring the beginning or end of the time span can sometimes be difficult.

- **“Within . . .”** If a document requires that something be done “within 30 days,” an immediate question arises, “Within 30 days of what?” Often, the intent is that it be done within 30 days of the signing of the contract. But if the contract requires Able to do something and then Betty to do something “within 30 days,” does the 30 days still refer to the date of the contract or does it refer to the date of Able’s act?
- **“After . . .”**

*The option lapses 7 days **after** the Landlord receives Tenant’s notice of non-renewal.*

As is true with respect to specific dates, courts consistently hold that the day of the triggering event is not included and that the reference is to full days. Thus, if the landlord received the notice on July 5th, July 6th would be the first of the seven days and the option would lapse at the end of the day on July 12th. The careless use of the word “time” in this kind of provision can cause possibly unintended consequences, however.

*The option lapses 7 days **after the time when** the Landlord receives Tenant’s notice of non-renewal.*

If the landlord received the notice at 2:00 p.m. on July 5th, then the option is likely to lapse at 2:00 p.m. on July 12th, even though that might well not be the intent of the parties.

- **“Before . . .”**

Alternatively, the option provision could be expressed as follows:

*Tenant must exercise this option **before** 11:59 p.m. of the seventh day after the day on which the Landlord receives Tenant's notice of non-renewal.*

Although "before" and "after" are fairly safe to use in identifying time spans, the drafter must be careful not to create unintended substantive gaps.

Penalties for late filing are as follows:

1. 10 days and before the 20th day—\$45.
2. After 20 days and before the 30th day—\$100.
3. After 30 days—\$500.

What is the penalty for the person who files on the 20th or the 30th day? Using "on or before" would cure that problem.

● "Within ..."

*A Tenant who files a notice of non-renewal must then exercise the option **within** 7 days.*

Most courts construe this as beginning on the first day after the filing of notice and ending at 11:59 p.m. on the seventh day. Alternatively, some drafters use "before the expiration of" or "before 11:59" instead of "within." If the "within" is used in reference to a future date certain, as in "within 30 days of June 15," does this refer to the 30 days prior to June 15, the 30 days after June 15, or both?

g. Days, Weeks, Months, and Years. These terms are used in connection with time spans, which present one form of ambiguity, as discussed above. The terms, however, can also be ambiguous in their own right. A document is signed at 2:00 p.m. on Wednesday, July 28, 2009. It provides:

Buyer has two days to arrange financing, one week to secure insurance, three months to make the first payment, and five years to make the final payment.

Does "day" mean calendar days, beginning on the midnight of July 28th, or consecutive 24-hour periods, beginning at 2:00 p.m. on July 28th? Do "days" include weekends and holidays? Or is the intended reference to business days? If the term "business days" is intended or used, does its

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Does "day" mean calendar days, beginning on the midnight of July 28th, or consecutive 24-hour periods, beginning at 2:00 p.m. on July 28th? Do "days" include weekends and holidays? Or is the intended reference to business days? If the term "business days" is intended or used, does its

meaning change depending upon when the parties operate their businesses? In this increasingly 24/7 world, arguably every day is a business day. Similarly, does a "week" mean seven consecutive calendar days? If so, does the week include that Wednesday and thus end on Tuesday? Or does it begin on Thursday and end on the next Wednesday? Or does "week" mean the next unit beginning on Sunday and ending on Saturday? If the document was signed on Monday, is it possible that the reference is to a five-day business week? Similarly, does "months" refer to full calendar months, beginning with August and ending on October 31? Or do the three months run from the time and date of signing, with the three months ending at 2:00 p.m. on October 28? Or perhaps it means the lunar month of 28 days. Similar problems exist with respect to the exact length of and how to mark the beginning and end of a "year."

The usual construction is that "days" includes Saturdays, Sundays, and holidays; that a "week" refers to seven consecutive days; that a "month" covers the period between and including a date-certain in the starting month (July 4) and the day before that date in the next month (August 3); and a "year" covers the period between and including a date-certain in the starting month (July 4, 2009) and the day before that date in the next year (July 3, 2010). But if the context would suggest otherwise, or if the intent is otherwise, then the drafter should not leave matters to chance. If a specific date can be calculated, then reference it in the manner discussed above. Alternatively, express the length in words that leave no room for uncertainty.

Each party has 7 days to object to the report, beginning on the day and at the time the report is filed and ending at 5:00 p.m. on the seventh day (excluding weekends and federal holidays) following the day the report is filed.

If the report was filed at 10:00 a.m. on Monday, October 5, 2009, objections would be due before 5:00 p.m. on Wednesday, October 14, 2009.

In statutes and complex private documents, if days, weeks, months, or years are referred to in several places, then a definition identifying when these periods begin and end would eliminate the awkwardness of the provision suggested above.

“Day” means the next full 24-hour period following the event referenced, beginning at 00:01 a.m., and each consecutively following full 24-hour period, exclusive of Saturdays, Sundays, and federal holidays.

h. “Bimonthly,” “biannually,” “biennially,” “semimonthly,” and “semiannually.” Bryan Garner’s authoritative *A Dictionary of Modern Legal Usage* says that “bimonthly” means every two months and “semimonthly” means twice a month. But he recognizes that “bi-” is also used to mean twice. The *New Oxford American Dictionary* says that bimonthly can mean either twice a month or every two months. Garner says that “biannually” and “semiannually” both mean twice year, while “biennially” means every two years. No further proof of the ambiguity of these terms is needed. They should be avoided altogether and “every two” or “twice a...” used instead, depending on what the drafter intends.

i. Hours. A contract that requires something to be done “by no later than 2 o’clock” is probably intended to refer to 2 p.m., since few people are out and about during the early morning hours. But the context of the contract might suggest otherwise, thus creating an ambiguity. Drafters should always clarify their time references with “a.m.” or “p.m.”

Even these references can be ambiguous in one instance. Assume that a city ordinance prohibits parking in a certain area “between 8 a.m. and 12 p.m.” A person is given a ticket for parking in the area at 1:30 p.m., assuming that the “12 p.m.” reference was to noon. The city maintains that “12 p.m.” refers to midnight. Although that is how “12 p.m.” is normally construed, with “12 a.m.” being construed as referring to noon, the term is at least potentially ambiguous. And technically, neither party is correct. According to the Naval Observatory Time Service Division, “p.m.” refers to the time from when the sun is directly overhead to when it is directly overhead the directly opposite part of the earth and “a.m.” refers to the time from then until the sun is back directly overhead. But neither term can be used to describe when the sun is directly overhead or in the converse posi-

tion. The Observatory recommends using “noon” or “midnight.”

“Noon” may be safe enough, but “midnight” is not. A reference to “midnight on October 23, 2009,” could refer to the midnight joining the 23rd with the 24th, which is the generally accepted American usage, or it could refer to the midnight joining the 22nd with the 23rd, which is how it is used in some European countries. The clearer references would be either to “00:00:01 a.m. on October 23, 2004,” or to “11:59:59 p.m. on October 23, 2004.”

j. Relational Words. Do not use “now,” “currently,” or “presently.” The danger is that this time reference will be construed literally, when that is not what is intended, thus creating potential for ambiguity. For example:

*Seller shall not charge a price in excess of that **currently** charged in the Atlanta wholesale cotton seed market.*

What if the allowed price is \$1,000 at the time of contracting but when the price is actually charged the Atlanta regulated price has dropped to \$900? Which controls? If the contract price is intended to fluctuate, delete “currently” and add “in effect the time of delivery.” If the reference is to the price allowed on the date of the contract, delete “currently” and add “as of the date of this contract.” Alternatively, simply write in the existing price as of that date.

k. Ages. Contracts refer to the ages of the parties less often than do statutes and private law documents like wills. These references are often ambiguous.

Nephew will not smoke or drink until he is over 21 years of age.

Can the nephew start smoking and drinking after his 21st birthday? Or must he wait until after his 22nd birthday? Whichever interpretation is intended, it should be stated in just those terms.

Nephew will not smoke or drink until after his 21st birthday.

l. “Provided that.” The word “provided” is ambiguous because it can be used in so many senses. Its only proper use is as a verb.

Seller will provide transportation for the goods.

The “provided that” form of the word traces its origin to the time when the Latin phrase *provistum est* was used to introduce each separate and independent section of a statute. The full English translation was used later. “It is provided that . . .” This at least gives the sentence a grammatical subject, albeit an expletive, “it,” and a verb, “is.” Eventually, the “it is” was dropped. What is left defies grammatical analysis. Provisos produce single sentences that are often hundreds of words long. Knowledgeable drafters have railed against them for years.

Apart from being a grammatical abomination, “provided that” is ambiguous because it can be used variously to introduce exceptions, qualifications, conditions, and even new substantive provisions.

*C. Cure. Seller may attempt to cure any defects, **provided**, however, **that** notice of intent to cure is given within 10 days of the notification of the defect; and **provided that** buyer does not waive notice; and **provided** further **that** if the attempt at cure is unsuccessful, seller will replace the item and compensate buyer for any losses due to delay.*

The first proviso imposes a condition precedent. The second proviso states an exception. And the third proviso deals with an altogether new substantive provision. These should be dealt with directly, using the terms that create each of these legal consequences, as follows:

C. Cure. (a) Seller is entitled to attempt to cure any defects. (b) If seller elects to attempt to cure, seller must give notice of that intent within 10 days of notification of the defect, unless seller has waived notice. (c) If seller’s attempt to cure is unsuccessful, seller will replace the item and compensate buyer for any losses due to delay.

Implementing this suggested usage is an uphill battle, as the introduction of baskets and materiality thresholds in contracts with “provided, however, that” and “provided further, however, that” is widespread and accepted practice in, among other places, the majority of large transactional law firms.

m. Legalese. Apart from being archaic and unnecessarily wordy, some legalese is also ambiguous because these terms often have multiple referents. Suppose that a sentence in a regulation concludes, “and the benefits provided herein are available to all dependents who file within 30 days of termination of service.” Does this apply only to whatever benefits are described in that sentence, to benefits described in that particular section, or to benefits described anywhere in the regulation?

“Hereunder” could also be construed as referring to any of those three possibilities, or it could be construed as referring only to things appearing in the agreement after the word is used. Similarly, a reference to “aforementioned benefits” is ambiguous if the document has earlier referenced several different sets of benefits. Are all of them included, or only the last grouping?

Replace these ambiguous terms with specific references, like “the benefits provided in subsection 304(a)(ii).”

If you are trying to say “in this document,” say that—name the document (using a defined term—this Agreement, this Lease, etc.—can be helpful here). If you are trying to say “in this paragraph/section/etc.,” just say it.

The same applies to all the here-, there-, and -said words like “hereby,” “hereinafter,” “therefore,” “therein,” “afore-said,” and others. Similarly, “same” and “such” should be avoided if at all possible. They are weak substitutes for proper pronouns and good defined terms. They can also create ambiguous references.

n. Shall, May and Will. The key problem here is that “shall” is commonly (mis)used for all three words, causing ambiguity. “May” is permissive—meaning the actor has an *option* of taking an action or receiving a benefit—it expresses a privilege. “Shall,” on the other hand, means the actor has no choice; he or she has a duty.

At or before the closing, the Seller shall deliver the Purchase Price to the Escrow Agent.

Buyer may waive any of the conditions to Buyer’s performance in its sole and absolute discretion.

The word “shall” is properly used only to create duties that attach to particular persons. When “shall” is used in

connection with a non-person in a passive voice sentence, it may be unclear whether this is intended to create merely a condition or to impose a duty on the implied actor. For example:

The house shall be completely painted before the payment of \$400 is due.

Does this mean that the painter has assumed a duty to paint the house that is also a constructive condition of the owner's duty to pay \$400—a bilateral contract? Or is this simply a unilateral offer the acceptance of which, by completely painting the house, triggers the owner's duty to pay—but itself not creating any duty on the painter's part to accept?

“Shall” can also be ambiguous when it is misused in a descriptive sense:

The Mayor is empowered to appoint the Chief of Police who shall be a resident of the city.

Does this merely describe the Mayor's pool of eligible appointees, limiting it to persons already living in the city, with the appointment of a non-resident going beyond the scope of his power? Or does it mean that although the eligible pool is unlimited, once appointed the Chief of Police has a duty to become a resident of the city?

Differentiate between rights (entitlements) and duties (obligations). Rights are created by “entitled to” phrases (tenants are entitled to quiet enjoyment of the premises); duties are created by “shall” phrases (tenants shall clean and maintain the area around their front doors in good repair). It is best to use “shall”—which is fairly archaic English—only to refer to duties.

You may be tempted to use “must” in place of “shall”. However, this is not standard in United States practice and opposing counsel and colleagues may object. “Must” is appropriate for creating a condition precedent.

“Will” is similar to “shall,” as it may refer to a duty. When indicating a duty, it is best to stick to “shall” and eliminate “will” to avoid the implication of different meanings since “will” is also used to refer to events that are to occur after closing. It is essential though that in using “shall” or “will” to create a duty, that the drafter pick one term and use throughout.

If the bill passes as it is, the President will veto it. At the end of this session, the Legislation will adjourn. At that time, Contractor shall begin installation of new carpet in the Assembly Chamber.

The closing will take place at [address].

If the name of a party does not appear before the word “shall” in an apparent shall/duty clause, it is probably incorrect use of the imperative tense. For example, agreements often state that they “shall” be governed by the law of a particular state. This is incorrect. Rather, the agreement should state the choice of law clause as a present tense actual circumstance, using “is.”

This agreement is governed by the laws of [state].

If the provision is a declaration of a future fact, use “will” in its predictive sense instead of “shall.”

Final approval or disapproval will occur no later than June 1, 2010.

Note, however, that this same phrase, cast in the active voice to identify the actor, becomes a “shall clause”:

The Buyer shall approve or disapprove performance no later than June 1, 2010.

And when drafting, include consequences of a failure to perform the duty, either by listing it as an event of default that may trigger a remedy or by specifying that failure to, for example, approve or disapprove performance by June 1, 2008, will not be deemed to be approval.

o. “Among” and “between.” The Oxford English Dictionary says to use “between” to express the relation of a thing to other things individually.

*The contest will be **between** the various plant managers.* But use “among” to express the relationship of a thing to other things collectively and vaguely.

*Fund recipients must work **among** the poor.*

The conventional wisdom, however, is that “between” refers to two things and “among” refers to more than two things.

*This is just **between** you and me, but I intend to distribute the reward evenly **among** Ann, Betty, Carol, and Diane.*

Number is not the only distinction between “between” and “among.” A contract is made *between* three parties, not *among* them. Essentially, “between” indicates a direct relationship from each party to each party. “Among” is less specific and may connote an arrangement where some parties are directly connected and some are not.

Suppose a will says:

The Executor shall divide my estate [among or between] my son and the two children of my deceased daughter.

If the choice is “between,” then a court adhering to the conventional wisdom would divide the estate into two equal shares, one for the son and the other split into equal amounts for the two children. But if the choice is “among,” then the same court would divide the estate into three equal shares. The drafter should not leave such an important matter to the whims of conventional wisdom.

3. Syntactic Ambiguity

Syntactic ambiguities arise principally out of the order in which words appear and how they are punctuated, which affects what other words they modify or refer to. Consider the following notice in the parking garage of a health care facility:

All patients must park on the same level as the doctor you are visiting.

Now you understand why you can never find a parking place when you go to the doctor!

The most common forms of syntactic ambiguity are as follows.

a. Pronoun Reference. The general rule is that a pronoun refers back to the immediately preceding noun. When this construction is inconsistent with the sense of the provision, an ambiguity arises. Which is to prevail, the general rule or the sense? Consider this classic example:

*Holding up a cookie box for his sister to see, a boy says, “If you can guess what kind of cookie is in this box, I’ll give **it** to you.”*

“Chocolate chip,” she replies.

“Right,” he says, as he removes the cookie, eats the cookie, and hands her the now empty box.

Here, the antecedent “it” is ambiguous. The sister reasonably believed the prize was the cookie. The boy, however, can rely on the general rule and assert that the grammatical reference was to the box.

Or suppose a contract provides as follows:

Seller will load a dumpster onto a vehicle provided by Buyer. It will be capable of holding three tons.

Common sense dictates that “it” does not refer to the buyer, although that is what the rules of grammatical construction would suggest. But does it refer to the dumpster or the vehicle?

In addition to being in bad style, using “such” as a demonstrative pronoun often creates ambiguity:

*Employees shall not remove any die tap tools from the plant that are not checked out with the Tool Supervisor and each Shift Supervisor shall inventory **such** tools weekly.*

Does the Shift Supervisor have a duty to inventory all die tap tools weekly, to ensure that none are missing? Or does the duty extend only those that are checked out, to determine how many are checked out and where they are?

b. Modifiers. Modifiers are a ready source of ambiguity and come in a variety of forms.

Items in a series. It is unclear in some phrases whether an adjective is intended to modify only the noun that immediately follows or all of the series of nouns that follow. Similarly, it is often unclear whether a trailing clause modifies only the last preceding noun or other parts of the sentence as well. Suppose that a will authorizes the executor to select and give a certain amount of money to “educational institutions and corporations working with the hearing impaired.” This could mean at least four different things, depending on what is construed as modifying what. A technique known as tabbing allows the drafter to identify the possibilities inherent in this phrase, as follows:

- educational institutions
and
corporations working with the hearing
impaired
- educational
institutions
and
corporations working with the hearing
impaired
- educational institutions
and
corporations
working with the hearing impaired
- educational
institutions
and
corporations
working with the hearing impaired

Each option reflects a different intent. The ambiguity can be easily resolved through the technique of enumeration, discussed in Chapter 16. This simply involves putting those examples in sentence form, using numbers and letters in parentheses to identify the groupings, and perhaps also using the tabbing or indentation convention, as follows:

I direct the Executor to distribute \$10,000 to one or more (a) educational institutions or (b) corporations, either of which works with the hearing impaired, with the selection of the recipients and amount given to each recipient to be within the discretion of the Executor.

-or-

I direct the Executor to distribute \$10,000 to one or more (a) educational institutions or (b) corporations who are working with the hearing impaired, with the selection

Quality Versus Identity. When an entity is modified by a chain of adjectives, it may be unclear whether the modifiers in combination describe the collective quality of the thing or are suggesting that separate entities are involved, each possessing one of the qualities described.

Distributor shall supply red, white, and blue caps.

Must each cap contain all three colors (quality)? Or may the distributor supply solid red, solid white, and solid blue caps (identity)?

Linkage Problems. Does “working dog owners” refer to persons who own a dog classified within the working breed category—linking “working” and “dog” together? Or does it refer to persons who work and also own dogs—linking “working” and “owners?”

Dangling Modifiers. Another form of ambiguous modifier is one that “dangles.” A modifier, usually an introductory phrase, dangles if the reader cannot identify what the modifier refers to in the main clause of the sentence. Consider the following provision in a will:

If alive but incompetent at the time of my death, my son's guardian shall inherit half of my estate for his continued care and keeping.

Suppose the son is dead and the guardian is alive but now incompetent. Does the guardian inherit? Grammatically, the introductory clause applies to the guardian, who should thus be entitled to inherit. This, however, is not the likely intent of the testator. This potentially legally significant dangling modifier can be corrected by making the subject of the introductory phrase express.

If my son is alive but incompetent at the time of my death, his guardian shall inherit half of my estate to provide for my son's continued care and keeping.

Squinting Modifiers. A modifier “squints” if the reader cannot determine whether it modifies the preceding or the following word or phrase.

*If buyer determines the goods are defective **within 20 days** seller shall replace them.*

Is the buyer's determination limited by the 20 days? Or does that relate to the seller's duty of replacement?

Passive voice. The passive voice often contributes to the use of dangling modifiers—which is just another reason to avoid it. Consider this sentence:

To prove satisfaction of the notice requirement, a courier service approved by the Department of State under 34 U.S.C. § 89-667 must be used.

Upon first reading, it would appear that “a courier service” is the entity trying to satisfy the notice requirement. That, obviously is not what is intended, as is finally indicated by the trailing passive voice phrase “must be used.” The ambiguity can be resolved by stating the main clause in the active voice.

To prove satisfaction of the notice requirement, the parties must use a courier service approved by the Department of State under 34 U.S.C. § 89.667.

c. Participles. A passive past participle can produce ambiguities of status.

Each person who was admitted to the Club on January 1, 2009, is eligible.

Does this include only persons who became members on that particular date? Or does it refer to persons who enjoyed the status of membership on that date? Even an active voice participle can be ambiguous if the noun it modifies is unclear.

No person shall accost another wearing a police uniform.

Does this provide protection to persons wearing police uniforms? Or does it mean that you cannot don a police uniform and accost people?

d. Chain Prepositions. Chains of prepositions create ambiguity because it is unclear what they refer to.

Each stockholder of a Chapter 9 corporation in Georgia is entitled to . . .

Does this refer to each Chapter 9 stockholder who resides in Georgia? Or does it refer to each stockholder in a corporation that operates in Georgia?

e. Negative Pregnants. A negative pregnant is a sentence that denies something in particular, but that can also be construed as an implied admission of what is not denied. Because the implication may or may not be read into these sentences, they are necessarily ambiguous. Suppose, for example, the contract is for the sale of widgets, smidgets, and gidgets. A recital states:

The parties acknowledge that Seller is not a merchant of widgets.

Later, an issue arises over seller's status as a merchant of smidgets or gidgets. Is the recital an implied admission that the seller is a merchant of these other items?

f. "If ... Then" Sentences. Many drafters use the "if ... then" construction when dealing with conditions. Usually, this causes no problems. But, as was discussed in Chapter 9, "if ... then" sentences can present substantive gaps. If a gap can be filled in two plausible ways, as is often the case, then an ambiguity exists. Assume that a collective bargaining agreement contains the following provision:

*If an employee requests an unpaid personal leave in writing at least 10 days in advance and has no unused vacation time, **then** the shift supervisor shall approve the request.*

The "if" clause imposes three conditions precedent to the shift supervisor's duty to approve the request—in writing, 10 days in advance, and no unused vacation time. If the conditions are satisfied, the duty is activated. That seems clear enough. But what if the shift supervisor approves a request that was submitted only 7 days in advance? The union files a grievance, claiming that this is a breach of the contract and that this shift supervisor is showing favoritism. The question is whether that provision contains a negative inference that the shift supervisor can approve an unpaid personal leave request only under those circumstances. Logically, that is not a valid inference, although that was probably the intent of the parties—hence the ambiguity.

"If ... then" clauses can be ambiguous in another sense. Suppose a contract provides:

If delivery is on or before June 30, 2004, then purchaser will tender cash.

This pretty clearly imposes a duty on the purchaser to tender cash when the seller elects to make delivery on that date. But suppose on June 30th the purchaser tenders cash and demands immediate delivery? Is the seller under an affirmative duty to make delivery on that date? As a matter of formal logic, the answer is no. From “If A, then B; B,” one cannot infer “A.” That is known as the fallacy of affirming the consequent. But the context, circumstances, or prior conduct of the parties may suggest that the tender of cash activates a duty to make delivery on that date. The drafter should determine the intended relationship between the delivery date and the tender of cash and make that relationship express through appropriate language, thus avoiding the ambiguity.

In sum, although the “if . . . then” configuration is a useful one, it is fraught with potential ambiguities that the drafter should be aware of and avoid.

g. “Because” Clauses. A sentence containing a “because” clause may be ambiguous if the reader is unsure if the clause modifies only the immediately preceding phrase or if it modifies the entire statement.

Owner may not deny requests for time extensions because of anticipated labor disputes.

Does this refer to an unacceptable reason for denying a request for a time extension, namely because of an anticipated labor dispute? Or does it refer to a particular type of request for extension that cannot be denied, namely those based on an anticipated labor dispute?

h. “Unless” Clauses. “Unless” is a term of negation. If the conditions of the “unless” clause are satisfied, this negates the concept that it refers to.

Unless the ship Peerless comes in on Wednesday, Acme will buy the cotton.

The “unless” clause, if satisfied, negates the promise to buy cotton. That is, if the *Peerless* does come in on Wednesday, Acme is not obligated to buy the cotton. Conversely, if the “unless” clause is not satisfied, then whatever it refers to

remains operative. So, if Wednesday passes without the appearance of the *Peerless*, the promise to buy is activated.

An “unless” clause that relates to a clause that is itself already stated in negative terms can cause enormous confusion. Normally, the negation of a negation creates a positive. “It is not the case that the hose was unconnected” logically means that it was connected. In drafted documents this is not always what is intended.

Seller will not ship by rail unless the Teamsters are still on strike on December 10, 2009.

If the “unless” clause is satisfied and the Teamsters are still on strike, this negates the prior clause. Logically, this means, “It is not the case that Seller will not ship by rail.” But what does that mean when translated into conventional English? Does it merely mean the duty to not use that mode of shipment is vacated, still leaving it open to the Seller to use it or other methods of delivery? Or does it mean that Seller now has an affirmative duty to ship by rail, with the two negatives canceling each other out? Although other shipment provisions in the contract might resolve that ambiguity, the careful drafter would not let it arise in the first place.

i. “**Only.**” Technically, the word “only” modifies the word or phrase it immediately precedes. Under this rule of construction, the placement of “only” is very important. Note how the meaning of the sentence changes by the addition and location of “only.”

Base Sentence: The buyer shall inspect the goods on the dock.

(1) *Only the buyer shall inspect the goods on the dock.*
[This means that no one except the buyer shall inspect.]

(2) *The buyer only shall inspect the goods on the dock.*
[This was probably intended to reflect the same idea as sentence (1). Technically, however, it modifies “shall inspect,” which means that the activity is limited to inspection, perhaps in distinction to taking possession of them.]

(3) *The buyer shall only inspect the goods on the dock.*
[Splitting the compound verb with “only” makes it even

clearer that buyer's dock activity is limited to inspection.]

(4) *The buyer shall inspect **only** the goods on the dock.*
[This means that the inspection is limited to the goods on the dock.]

(5) *The buyer shall inspect the goods **only** on the dock.*
[This limits the location of the buyer's inspection, although it could also be construed as limiting the goods to be inspected, namely those on the dock.]

(6) *The buyer shall inspect the goods on the dock **only**.*
[This violates the rule of construction, since the "only" precedes nothing. It was probably intended to limit the goods to be inspected, although like sentence (5) it might also be construed as limiting the location of the inspection.]

These examples suggest that the careful drafter should probably avoid the use of "only" altogether and express the idea in clearer, less ambiguous terms.

j. Truncated Passive. A normal passive voice sentence might state:

All change orders over \$500 must be reported to the bank by the contractor within 10 days.

Apart from its wordiness, nothing is substantively unclear or ambiguous. But in a truncated version of the passive voice, the actor disappears from the sentence altogether.

All change orders must be reported to the bank within 10 days.

Who has the conditional obligation to make that report? Is it the contractor or the owner?

k. "Which" and "that." The choice between which and that is important, but not because the two words themselves have significantly different meanings. The choice is important, rather, because it can affect the syntax, structure, and meaning of the entire sentence. This is true, at least, when these words are used to introduce restrictive and nonrestrictive clauses.

A restrictive clause defines the noun it follows.

*The buyer shall inspect the goods **that are on the loading dock.***

The bolded clause is restrictive because it identifies and narrows the class of goods the buyer has a duty to inspect—namely a sub-class consisting of those that are on the loading dock. Restrictive clauses are not set off by commas.

A nonrestrictive clause, on the other hand, provides additional information about an already defined or identified noun.

*The buyer shall inspect the goods, **which are on the loading dock.***

Here, the bolded clause is nonrestrictive because it assumes the buyer already knows the identity of the goods to be inspected. The clause merely indicates where they are located. Nonrestrictive clauses are set off with commas.

Old-fashioned grammar purists vigorously insist on using “which” only in nonrestrictive clauses and “that” only in restrictive clauses, as in the above examples. While agreeing that “that” cannot be used to introduce a nonrestrictive clause, many modern style manuals allow the use of either “that” or “which” in restrictive clauses. The better drafting practice adheres to the old-fashioned approach. This is not just a matter of grammatical purity and proper style. In some instances the misuse of “which” and “that” creates ambiguity. Consider this sentence in a stipulation to arbitrate disputes under a construction contract.

The basement wall defects which cost less than \$100 to correct shall not be submitted to this arbitration.

Does this constitute an admission that none of the alleged defects in the basement wall will cost more than \$100 to correct and that the parties are agreeing not to arbitrate them? If that is what was intended, the clause “which cost less than \$100 to correct” should be set off with commas. This indicates that the clause is simply providing additional information about these defects. Under that construction, the owner demanding arbitration of some basement wall defects might be estopped from later claiming that these particular defects will cost more than \$100 to repair. Alternatively, the sentence could merely mean that some of the defects in the basement wall (as yet undetermined) are being

excluded from this arbitration—those that will cost less than \$100 to correct. If that is what was intended, the drafter should have replaced “which” with “that.” This provides the identity of the defects that are being excluded from the arbitration.

Finally, if a drafter can eliminate either “which” or “that” without creating an ambiguity, then do so in the interest of brevity. “The house **that** John built” can easily become “The house John built.”

1. Plural Nouns. Drafted documents generally use the singular even when more than one entity is subject to the legal consequence being created.

An applicant must file an appeal within 10 days after the day on which the application is denied.

This applies to all applicants. The convention avoids ambiguities that sometimes arise when a drafter uses plurals. For example, consider the following:

Employees with children qualifying for coverage must file affidavits of eligibility from persons listed below:

Does this apply only to employees with more than one child? Does it require more than one affidavit, presumably from all of the listed persons? These uncertainties can be resolved by using singular nouns and saying:

An employee with a child qualifying for coverage must file an affidavit of eligibility from a person listed below:

Usually, “a,” “an,” “the,” or nothing at all before a singular noun is sufficient to indicate that the sentence applies to everything within that noun class. However, if a sentence could be construed as allowing a duty to be discharged by applying it to a single member of the class or a right to be exercised by only one member of the class, then use “each,” “every,” or “all” plus a plural noun. The following sentence is capable of that construction:

A student with perfect attendance will be given a grade enhancement.

Matthew, Mark, and Luke all had perfect attendance, but the professor gave only Matthew a grade enhancement, claiming that the rule required that this be done for "a student," which indeed has been done. To prevent such pedagogical duplicity, the sentence should say:

Every student with perfect attendance will be given a grade enhancement.

m. Commas and Semi-Colons. Courts sometimes assert that punctuation is not a part of the statute. This non-deference to the grammatical implications of punctuation originated back when legislation was introduced orally. The punctuation was later added by clerks, who may or may not have understood either the intent of the legislature or the rules of punctuation. Today, almost all legislation is introduced in printed form. Along with the words that are used, the punctuation is one of the most important indicators of meaning. Drafters who ignore the significance of punctuation do so at their peril. Whether it is in legislation or private law documents, ambiguity can result from the misuse of commas and semi-colons.

Omission of the Serial Comma. The serial comma is the comma that follows the penultimate word or phrase in a series joined by "and" or "or." The comma clearly identifies each unit in the series.

- a. In a compound sentence composed of a series of short independent clauses the last two of which are joined by a conjunction, commas should be placed between the clauses and before the conjunction:

The attorney presented his closing argument, the judge instructed the jury, and the jury retired to consider the case.

- b. In a series consisting of three or more elements, the elements are separated by commas. When a conjunction joins the last two elements in a series, a comma is used before the conjunction:

Small, Nelson, and Lee attended the conference.

The owner, the agent, and the tenant were having an acrimonious discussion.

Omission of this comma can sometimes cause ambiguity.

Dealer will maintain a supply of hats in the following colors: red, blue, orange and black.

Is the dealer obligated to maintain a supply of, three kinds of hats or four? Putting a comma after "orange" makes it clear that the contract contemplates four kinds of hats, one in each color. To make the three-hat option clear, the drafter might say:

Dealer will maintain a supply of red hats, blue hats, and orange and black hats.

A series connected by more than one "and," but lacking the serial comma, can also be ambiguous with respect to which "and" creates a unit and which "and" links the series of units together. For example:

The Committee consists of one delegate chosen from each of the following four municipal areas: Able City, Bakersfield, Clarendon and Dover and Euclid.

Are Clarendon and Dover a unit? Or Dover and Euclid? A comma in the right place will resolve that ambiguity. The omission of a serial comma can also raise the question of whether it is a list of several units or one unit followed by a descriptive or defining phrase. For example:

The screening panel consists of five judges, two Democrats and three Republicans.

Does the panel consist of five judges, with the political affiliations as indicated? Grammatically, that is probably the most likely construction, although it could be made clearer by saying:

The screening panel consists of five judges, two of whom shall be Democrat and three Republican.

Or does the original sentence contemplate a panel containing 10 people, consisting of (a) five judges, (b) two non-judge Democrats, and (c) three non-judge Republicans? If that is what was intended, it should have been stated in just that form. A simple serial comma after "Democrats" (without the lettered parentheticals) would also support that construction, although less clearly.

The omission of the serial comma can also create ambiguities of modification, as in this example:

Tenant will not allow to remain on the premises overnight any persons not related by blood or marriage, minor children or pets weighing more than 25 pounds.

The omission of the serial comma suggests that the 10 pound infant who screams all night can stay all night! Similarly:

The Health Inspector may close a restaurant because of fire hazards, unclean facilities and rats.

One certainly cannot tolerate dirty rats.

Even in situations where the omission of the serial comma would not create an ambiguity, an omission may nevertheless create confusion and misunderstanding.

The buyer must inspect all incoming rail shipments within 10 days of arrival, promptly notify the seller of any discovered defects or shortages and arrange for transportation away from the rail site.

Here, the omission of the comma after "shortages" does not render the sentence ambiguous in any literal sense. The omission does, however, make the sentence difficult to understand and thus ambiguous in a loose sense, because it obscures the fact that the buyer has three distinct duties.

Finally, even if the omission of a serial comma will not create ambiguity or render the sentence obscure, the comma should always be included for the sake of consistency. Using the last comma will never be wrong, but omitting it may cause confusion. However, if you choose to forego the last comma, be consistent throughout the document and examine your result carefully to ensure your intended meaning is clear and legally precise.

Semi-colons. Although a semi-colon can be used as either a strong comma (separating phrases in a series that are either very long or already contain internal commas) or a weak period (joining independent clauses), in either case in drafted documents each semi-colon unit is expected to have its own independent legal consequence or effect. But when that rule of construction is at odds with the sense of the sentence, an ambiguity results. Suppose that a statute prohibits the sale or use of Class III fireworks, but further provides:

Nothing in this Act is intended to prohibit a resident wholesaler's sale of Class III fireworks for which a permit has been granted by the Department of Public Safety; or the sale of any kind of fireworks for shipment directly out of state; the use of Class III fireworks by railroads; or the use of Class III fireworks as maritime signal flares by boats in distress.

Sam Pyro, a retailer, sold \$10 worth of Class III fireworks to Betty Popp who immediately shipped them to her brother out of state. Is Pyro's sale within the exceptions to the prohibition? If the phrases separated by semi-colons have an independent legal consequence or effect, the answer is yes. The first phrase thus applies to wholesalers. The second phrase applies to anyone, including Pyro. The third phrase applies to railroads. And the fourth phrase applies to boaters in distress. But if the harm to be avoided is the possession within the state by actual or potential users of the fireworks covered by the Act, then one would conclude that Pyro is not covered by the exception. Rather, the sense of the statute is that the direct shipment exception was intended to apply only to wholesalers. If that is what was intended, as is likely, then the second phrase should not have been set off from the first phrase with a semi-colon.

In a series consisting of three or more elements that are themselves either clauses or sub-series, use a semi-colon in place of a comma for the highest level of the list. For example, "the available color combinations are red, white, and blue; yellow, green, and tan; and gold, red, and purple."

Exercise 9

Identify all the ambiguities in the following hypothetical provisions. That is, be prepared to state precisely that it could mean *this* or it could mean *that*. Read them from the perspective of the *reader in bad faith*—namely, a person who will exploit every possible loophole to gain even the slightest advantage, even if it is nothing more than a litigation settlement chit. Thus, do not let common sense blind you to the arguments that this person might make—arguments that may well fail, but only after expensive litigation. Some of the examples may contain multiple ambiguities.

- a. The *Bluebook*, Rule 12.9 at page 87 (17th Edition):

Note that except when referring to the U.S. Code provisions, the word “section” should be spelled out in law review text and footnote text, although the symbol “§” may be used in citations. See **rule 6.2(b)**.

The *Bluebook*, Rule 6.2(b) at page 49 (17th Edition): [S]pell out the words “section” and “paragraph” in the text (whether main text or footnote text) of law review pieces and other documents, except when referring to a provision in the U.S. Code, at state code, or a federal regulation (see **rule 12.9**).

Note that these ambiguities have been eliminated in the eighteenth edition of the *Bluebook, A Uniform System of Citation*.

- b. The Chair and Vice Chair may nominate up to three candidates for admission.
- c. This prohibition applies to papers written by students and faculty.
- d. Students in Legal Writing § 1 and Torts § 3 must attend the Wednesday orientation session.
- e. The winner will be a student chosen from Professor Hamilton’s and Professor Wright’s sections.
- f. Students on Law Review, possessing a 3.4 average, and certified by the Associate Dean are entitled to apply for the exception.
- g. For this weekend only, employees may apply to work overtime on Saturday or Sunday. Because only a limited number of positions are available, for each of these days the work will be awarded to employees on the basis of seniority.
- h. With respect to all packaged meat products entering the facility, the delivery dock inspector must certify that the USDA seal was intact at the time of delivery or the Head Cook may conduct bacterial tests, which must be paid for by seller.
- i. To graduate, a student must take either Advanced Commercial Law (4 credits) or Sales (2 credits) and Commercial Paper (2 credits).

- j. To graduate a student must take Drafting and/or Real Estate Transactions.
- k. A zoning variance may be obtained upon: (a) proof of a varying use prior to June 1, 2004; (b) proof that the public interest will be served by the variance; (c) written consent of adjoining property owners.
- l. To be eligible for the severance package, an employee who is being terminated must sign the ADEA waiver form between October 1, 2004, and October 15, 2005.
- m. If a law school applicant has not filed a notice of intent to matriculate by June 1, 2004, that student's acceptance will be automatically revoked.
- n. An applicant for public assistance during the 2003–2004 fiscal year has until July 1, 2003, to provide proof of indigency.
- o. Subject to the termination-by-notice provision of this contract, Buyer's obligation to purchase all its Carbolic Smoke Balls from Seller continues from October 23, 2003, to October 23, 2004.
- p. A terminated employee has until 14 days after the time the notice of termination is given to file a grievance.
- q. Measured from the day on which the notice of termination is given, an employee may transfer into another department without penalty before the 20th day; an employee may transfer into another department with loss of seniority after the 20th day and before the 30th day; an employee has no transfer rights after the 30th day.
- r. [Offer dated July 1, 2004] You must accept this offer within 14 days.
- s. [Notice of intent to terminate credit account, dated Wednesday, July 10, 2004] To avoid a \$100 penalty, you must at least pay the accrued interest within 5 days.
- t. Landlord agrees to clean the pool bimonthly and have a Department of Health bacteria inspection semiannually.

- u. This contest begins at midnight on October 1, 2004, and ends at noon on October 31, 2004.
- v. [Order of the Zoning Commission dated July 28, 2004] Whenever the Zoning Commissioner contemplates a change in the zoning category of a piece of residential property, it shall send by registered mail a notice of the proposed change to all persons presently residing within 12 blocks of that property.
- w. All persons over the age of 15 must pay full adult fare.
- x. Buyer will accept delivery on October 31, 2004, provided, however, that prior to that time Seller provides proof of clear title.
- y. 1. Job categories are divided into three groups:
 - (a) Group #1: Captain, First Mate, First Engineer, and Cook.
 - (b) Group #2: Second Engineer, Assistant Cook, Crew, Net Handlers, and Dock Handlers. All the job categories referenced hereinabove are also subject to Section 6(b) of the Union contract.
 - (c) Group #3: Apprentice Seamen, longshoremen, and temporary employees in all categories.
- z. The 12 football tickets will be divided between the Dean and members of the Faculty.
- aa. Contractor will install a loading dock with a sloped ramp on the side and it will be 18 feet long.
- bb. Employees on the second shift will be assigned some of the duties formerly performed by employees on the first shift, and such employees will be entitled to bid for jobs on the carbolic production line.
- cc. This leave policy applies to pregnant production department employees, shipping department employees, and R & D employees who have not otherwise exhausted their optional leave time.
- dd. This section applies to motorized vehicles, except those used in connection with the business and not licensed for road use.

- ee. Every employee with a spouse working in the Longtown Plant is entitled to participate in the Plan.
- ff. If damaged during shipment between Boston and New York, the standard rail car on which the goods were loaded at Boston will be replaced with a Conrail Supershock rail car for further shipment to Washington, D.C.
- gg. Only persons who were employed within two weeks prior to the effective date of the policy are required to provide the supplemental information listed below.
- hh. Every spouse of an employee with dependents of a prior marriage may opt for full coverage.
- ii. Seller will provide the lumber, pipes, and insulating material, but is not required to deliver the lumber to Buyer's work site.
- jj. If Buyer does not specifically request delivery by rail, Seller is not obligated to ship by that method. [Buyer does request delivery by rail. Is Seller obligated?]
- kk. If Seller is to be obligated to ship by rail, then Buyer must request it. [Buyer does request shipment by rail. Is Seller obligated?]
- ll. Dogs may be prohibited from the premises because of tendencies for barking.
- mm. Employees with less than 10 years seniority are not eligible to hold 1st shift jobs unless the shift supervisor consents in writing. No employee with less than 4 hours of OSHA disaster response training is eligible for 1st shift jobs.
- nn. Subcontractors only are subject to sections 45(a)-(t).
- oo. Owner and contractor agree that authorization by the City Building Code Commissioner will be obtained and the \$1,000 fee paid before construction begins.
- pp. All students must take an advanced legal writing course which includes legal drafting.

- qq. Applicants for pre-school tuition aid must bring their children to the Department of Social Services for an interview.
- rr. An employee who completes the February training session will receive a \$10 bonus and a certificate signed by the Plant Manager.
- ss. Every student must write a five-page paper on each of the following: Moses, the founding of modern Israel, Jesus and the right to die.
- tt. The prohibition against carrying weapons in vehicles on company property does not apply to the vehicles of employees on the first shift (11:00 p.m. to 6:00 a.m.) who park in Lot A; nor does it apply to the storage of weapons in the trunk of a car if that car is parked in lots B, C, or D.