Notes

AVOIDING INADVERTENT SYNTACTIC AMBIGUITY IN LEGAL DRAFTSMANSHIP

I. INTRODUCTION

Justice Oliver Wendell Holmes once stated: "A word is not a crytstal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[1] Law, as a profession of words,[2] is concerned more with the substantive and procedural points of law rather than with the finer points of good grammar.[3] These main concerns suffer, however, when correct grammar is neglected.[4]

Legal historians recognize that "language is no mere instrument which we can control at will; it controls us."[5] Being more than a tool of thought, language is "a part of the process of thinking," in that "[o]ur ideas are clarified in the very attempt to express them."[6]

The many words in the English language may be classified as either "form" words or "content" words. The more numerous content words "present a specific idea to the mind," while form words merely "show relationship" among the content words.[7] The most frequently used form words are articles,[8] prepositions,[9] and conjunctions.[10] One or more of these three types of form

---

1 Towne v. Eisner, 245 U.S. 418, 425 (1918).

2 D. MELLINKOFF, THE LANGUAGE OF THE LAW vii (1963) [hereinafter cited as MELLINKOFF].

3 Even Justice Holmes, himself a linguist, admonished: "We are not studying etymology, but law." O. HOLMES, THE COMMON LAW 215 (1881).

4 MELLINKOFF, *supra* note 2, at vii.

5 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 87 (2d ed. 1898).

6 Littleton, *The Importance of Effective Legal Writing in Law Practice*, 9 STUD. LAW., Oct. 1963, at 6.

7 M. BRYANT, ENGLISH IN THE LAW COURTS: THE PART THAT ARTICLES, PREPOSITIONS, AND CONJUNCTIONS PLAY IN LEGAL DECISIONS 1 (1962) [hereinafter cited as BRYANT]. This study was a dissertation completed in 1930, and republished in 1962.

8 For a synopsis of selected cases illustrating the various methods that the courts have used in construing the meaning of the three articles, "a," "an," and "the," *see* BRYANT, *supra* note 7, at 29-43.

9 For a synopsis of selected cases illustrating the various methods that the courts have used in construing the meaning of 41 prepositions, *see* BRYANT, *supra* note 7, at 44-201. The list includes these words: About, above, across, after, against, along, alongside, among, around, at, before, behind, below, beneath, besides, between, beyond, by, concerning, down, except, for, from, in, like, near, of, off, on, over, through, throughout, till, to, under, until, unto, up, with, within, without.

10 For a synopsis of selected cases illustrating the various methods that the courts have used in construing the meaning of 31 conjunctions, *see* BRYANT, *supra* note 7, at 202-94. The list includes these words: After, also, although, and, as, but, but also, either, if, likewise, moreover, nevertheless, nor, or, provided, so, that, then, till, unless, until, when, where, whenever, whereas, wherever, wherefore, whereupon, whether, while whilst.

words appears in practically every sentence that is written or spoken.[11]

Not only must the correct form word be used to show the proper relationship of content words in the sentence but the form word must also be used in the right place. If either the choice or the placement of form words is done incorrectly, then the whole meaning of the statemenet can be changed.[12] The purpose in this Note is to demonstrate how the misuse of one kind of form word, the coordinating conjunction, can lead to syntactic ambiguity and thus render unclear the meaning of the statement.

Since no phrase is "so completely accepted that its meaning will not be contested,"[13] a draftsman must exercise special care in attempting to achieve "a degree of precision commensurate with the client's objectives."[14] Nevertheless, litigation in some instances is inevitable regardless of the competency of the draftsman, such as a passed-over heir attempting to break a will or a guilty defendant making a last-ditch effort to avoid conviction by attacking the statute for uncertainty because of improper semantic usage.[15]

Hundreds of cases have involved the denotation of form words.[16] At least thirteen methods have been used by the courts in determining the meaning of form words upon which many of the cases turn. These include: (1) literal interpretation (what is considered by authorities on standard English to be the actual denotation of a word in its usual construction); (2) common meaning (what is understood by the general public in ordinary speech to be the accepted meaning); (3) etymology (determining the meaning of the word by going back to the original meaning of the word in the parental language); (4) historical development (tracing the history of the word, noting the different meanings, without going back to its original meaning); (5) interpretation based on intent (what the speaker intended as the meaning of the word); (6) interpretation based on putative intent (determining the meaning of a word in a hypothetical situation by what the court thinks would have been intended by the speaker had such a situation arisen); (7) interpretation suggested by fact (what the word takes on as a meaning according to the facts of the case); (8) specialized meaning (what the word means when it is assigned to various particular uses or functions); (9) technical meaning (meaning peculiar to any trade or profession); (10) interpretation suggested by technical terms (technical terms surrounding a word causing that word to take on a peculiar meaning);

---

[11] At the time of a detailed study in 1930, the meaning of the preposition "about" had been involved in more cases (exceeding 150) than had any single content word. BRYANT, *supra* note 7, at 2.

[12] *Id.* at 1.

[13] Steuer, *Legal Vocabulary—Its Uses and Limitations*, 15 PRAC. LAW., April 1969, at 45. Moreover, S.I. Hayakawa, a noted semanticist, claims that the meanings of words are "always shifting and changing in meaning." *See* S. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 60 (2d ed. 1964).

[14] R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 29 (1965) [hereinafter cited as DICKERSON].

[15] Rossman, *Better English for Lawyers as Draftsmen and Advocates*, 48 A.B.A.J. 1048, 1049 (1962) [hereinafter cited as Rossman].

[16] BRYANT, *supra* note 7, at 26.

(11) dictionary meaning (applying strictly what the word means in the dictionary); (12) context (what the meaning of the word acquires in relation to the subject matter); and (13) circumstances (determining what the word means from the surrounding circumstances).[17]

II. Inadequacies of Language

A. *General Overview*

Three major curable diseases infect language: ambiguity, vagueness, and generality.[18] "Ambiguity" is equivocation in language arising where there are "different significations equally appropriate" thus "capable of double interpretation."[19] An example of ambiguity is the question that could arise in the case of a testator bequeathing his "vessels" to a legatee as to whether he intended to bequeath only his crockery or only his yachts or both his crockery and yachts.[20]

"Vagueness" is "the degree to which, independent of equivocation, language is uncertain in its respective applications to a number of particulars."[21] In other words, vagueness refers to the use of general terms with an open textured meaning, thus often leaving unclear the intended scope of the words.[22] Examples of vague terms considered to be "too general to convey an exact meaning"[23] are those referring to colors,[24] and the popular political epithets of "liberal" and "conservative."[25] The most common example of vagueness lies in the field of criminal law in which the void-for-vagueness doctrine holds that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . . ."[26]

"Generality" refers to the use of a term that is "not limited to a unique referent and thus can denote more than one, that is, when it refers to a class."[27] Thus, unlike ambiguity and vagueness, generality does not constitute uncertainty of meaning of the word itself. An example of generality is the word "grandmother," which can be either one's maternal or paternal grandmother.[28] Thus, generality permits simultaneous reference, while ambiguity is limited to

---

17 *Id.* at 26-29.

18 Dickerson includes obesity as a major disease as "a matter not of size but of excess." Dickerson, *supra* note 14, at 31.

19 *Id.* at 23, *quoting* 3 Oxford English Dictionary E263 (1933).

20 Christie, *Vagueness and Legal Language*, 48 Minn. L. Rev. 885, 886 (1964) [hereinafter cited as Christie].

21 Dickerson, *supra* note 14, at 27-28.

22 Christie, *supra* note 20, at 886.

23 P. Perrin, Writer's Guide and Index to English 225 (3d ed. 1959) [hereinafter cited as Perrin].

24 Christie, *supra* note 20, at 886.

25 Perrin, *supra* note 23, at 485.

26 Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 68 (1960), *quoting* from Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

27 Dickerson, *supra* note 14, at 30.

28 *Id.* at 30, 31.

only alternative (either—or) reference.[29] On the other hand, "the uncertainty of vagueness lies in marginal questions of degree"[30] of reference.

Generality is not *ipso facto* fatal to a legal document. However, generality coupled with either ambiguity or vagueness can be fatal. For example, a testator devising his property to "my grandmother" has employed a general term which is valid if testator has only one living grandmother. However, the same devise would be deemed ambiguous if testator had more than one living grandmother, thus causing the will to fail if there is no competent evidence for determining testator's intent.

Although some writers use the terms ambiguity and vagueness either interchangeably or as if the former encompasses the latter,[31] language nevertheless can be ambiguous without being vague, and vice versa. For example, the word "he" in a lease provision might refer to the lessor or the lessee, and thus would be ambiguous but not vague. On the other hand, the phrase "reasonable time" in a contract might be vague but not ambiguous.

Unlike ambiguity, vagueness and generality often are desirable techniques for injecting flexibility into a legal instrument, thus granting to those administering the instrument sufficient leeway in the resolution of uncertainties to face the exigency of the situation.[32] Especially in the area of public law, the legal profession abounds with examples where vagueness in legal language has been an indispensable tool for injecting much needed flexibility—as witnessed in constitutional standards ("due process" clause of the fifth and fourteenth amendments), constitutional doctrines ("with all deliberate speed" doctrine applied by the Supreme Court in school desegregation cases), and statutes ("unfair methods of competition" section of the Federal Trade Commission Act of 1914).[33] In situations like these, the draftsman or the propounder allows for "individualized application of a legal directive" by promulgating "some vague general standard which can evolve through a series of individual applications, a general standard which can even change in content as the nature of society changes."[34] Used in this manner, vagueness can be an "inescapable attribute" of legal language, which is "not a deterrent but, rather, an indispensable element in the regulation of human conduct through legal rules."[35]

Obesity (which consists of prolixity, circumlocution, avoidable redundancy, and other necessary language) is a fourth inadequacy of legal language. However, unlike extreme examples of ambiguity, vagueness, and generality, obesity will not render a legal instrument ineffective. Rather, obesity merely impedes the understanding of the instrument by cluttering the instrument with

---

[29] *Id.* at 30.
[30] *Id.* at 28.
[31] *Id.* at 27, *citing*, as an example, Jones, *Extrinsic Aids in Federal Courts*, 25 IOWA L. REV. 737, 739 (1940); *cf.* Christie, *supra* note 20, at 886.
[32] DICKERSON, *supra* note 14, at 31.
[33] Christie, *supra* note 20, at 889-90.
[34] *Id.*
[35] *Id.* at 885 (emphasis omitted).

cumbersome language.[36]

B. *Ambiguity*

Ambiguity[37] appears to be "the most serious disease of language."[38] "[Ambiguity] arises when application of pertinent rules of interpretation to an instrument as a whole fails to make certain which one of two or more meanings is conveyed by the words employed by the parties."[39] However, parol evidence is not admissible to explain the meaning of an unclear instrument, such as an ambiguous contract, unless there remains after application of the rules of interpretation a real uncertainty as to the intended meaning of the instrument.[40]

Ambiguity in law is principally of two procedural classes: patent and latent. A patent ambiguity is one which is evident on the face of the document itself. It is an inherent ambiguity, and cannot be removed by parol evidence.[41] Because it should have been recognized and avoided by the draftsman, a patent ambiguity will be construed against the writer. Thus, a draftsman of an ambiguous contract will be bound by the interpretation placed upon it by the other party to the contract.[42] On the other hand, a latent ambiguity is one where the writing appears on its face to be certain, but the ambiguity arises when parol evidence is introduced.[43] A court will frequently nullify a document when the latently ambiguous term is essential to the whole scheme in the document.[44]

There are three substantive kinds of ambiguity: semantic, contextual, and syntactic. "Semantic ambiguity" is "traceable to the multiplicities of dictionary definitions, which exist independent of context."[45] An example is the use of the ambiguous word "vessels" in a testamentary devise. The question thus could arise as to whether testator intended to bequeath only his crockery, or only his yachts, or both his crockery and yachts.[46]

"Contextual ambiguity" arises when "one provision clearly contradicts another [making it] not clear which is intended to prevail."[47] An example is the ambiguous word "heir" in a testamentary devise of a life estate to testator's daughter with vested remainder over to testator's heirs. The question thus could arise as to whether or not testator's daughter was intended to be included as an heir in the vested remainder, with her issue taking her share per stirpes.[48]

---

36 DICKERSON, *supra* note 14, at 31.
37 *See generally* 3 C.J.S. *Ambiguity* 1034 (1936); 3 WORDS & PHRASES *Ambiguity* 436 (1953).
38 DICKERSON, *supra* note 14, at 23.
39 Wood v. Hatcher, 199 Kan. 238, 242, 428 P.2d 799, 803 (1967).
40 Turk v. Jeffreys-McElrath Mfg. Co., 207 Ga. 73, 75, 60 S.E.2d 166, 168 (1950).
41 Brown v. Guice, 46 Miss. 299, 302 (1872).
42 Goddard v. Holland Transp. Co., 84 N.Y.S.2d 410, 413 (Sup. Ct. 1948).
43 Brown v. Guice, 46 Miss. 299, 302 (1872).
44 *See, e.g.*, Raffles v. Wichelhaus, 2 Hurl. & C. 906 (1864).
45 DICKERSON, *supra* note 14, at 25.
46 Christie, *supra* 20, at 886.
47 DICKERSON, *supra* note 14, at 25.
48 *Id.* at 25-26.

"Syntactic ambiguity" arises when there is "uncertaint[y] of modification or reference within the particular instrument."[49] Thus, the ambiguity relates to "the relationship between the words or word groups in a sentence."[50] Syntactic ambiguity can consist of: (1) squinting modifiers (when it is unclear whether a word modifies one or more words, as in: "*charitable* corporations or institutions performing educational functions"); (2) uncertainty or pronominal reference (when the context leaves uncertainty as to what word a pronoun refers, as in: "John told Sam that *he* would purchase the car."); (3) juxtaposition of "the scope of a modifier and the scope of the thing modified"[51] (when it is unclear whether a word is part of the modifier or is part of the thing modified, as in: "*mock* turtle soup"); (4) dangling terminal "because" clauses (leaving it unclear whether the clause relates to the entire statement or merely to the phrase immediately preceding, as in: "The union may not rescind the contract *because* of hardship."); and (5) juxtaposition of two prepositional phrases (leaving it unclear whether the second prepositional phrase relates to all or part of the first prepositional phrase, as in: "every member *of* a chapter *in* Indiana").[52]

Ambiguity sometimes is employed intentionally[53] as "an indispensable feature in certain kinds of communication,"[54] such as in Congressional statutes on controversial subjects being designed in either ambiguous or vague terms in order to "pass the buck" to the courts.[55] The focus of attention in this Note, however, is on recognizing the importance of consciously making a systematic effort to reduce *inadvertent* syntactic ambiguity.

Emphasizing the need for the legal draftsman to concentrate on avoiding syntactic ambiguity in written instruments does not imply, as some fear, that "emphasis on the role of logical words . . . might encourage adoption of that interpretation of a document or legal authority which is most consistent with the technical use of the logical words occurring in the document."[56] Rather,

---

[49] *Id.* at 25.

[50] PERRIN, *supra* note 23, at 732.

[51] DICKERSON, *supra* note 14, at 74.

[52] *Id.* at 75.

[53] Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 833 (1957) [hereinafter cited as Allen]. *But see* N. WEINER, THE HUMAN USE OF HUMAN BEINGS 117 (1950): "[T]he first duty of the law, whatever the second and third ones are, is to know what it wants. The first duty of the legislator or the judge is to make clear, unambiguous statements . . . ."

[54] Probert, *Law Through the Looking Glass of Language and Communicative Behavior*, 20 J. LEGAL ED. 253, 269 n.46 (1968) [hereinafter cited as Probert].

[55] For examples of the purposive use of ambiguity by legislatures, *see* C. ILBERT, THE MECHANICS OF LAW MAKING 1-23 (1914) and E. LEVI, AN INTRODUCTION TO LEGAL REASONING 21-22 (1948). *See generally* Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23 (1956) [hereinafter cited as Miller] and Young, *Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619 (1964).

[56] Summers, *A Note on Symbolic Logic and the Law*, 13 J. LEGAL ED. 486, 492 (1961) [hereinafter cited as Summers], *quoting* O. JENSEN, THE NATURE OF LEGAL ARGUMENT 27 (1927):

> That the logical structure which is unambiguously indicated by the logical words in a statement should be taken as the one intended by the author of the statement is not a rule of logic. On the contrary, it is logical to give the statement the other logical structure if there is factual evidence that this is the one the author of the statement intended.

the objective is to help reduce the frequency of the occurrence of ambiguous statements in legal documents.[57] As one writer put it: "[E]ven if all other communication factors are harmonious, the semantic and syntactic factors related to the literal level, such as the simpler ambiguities, poor grammar or pronoun reference, and such, may produce misunderstanding, disagreement, or even conflict, making further 'good' communication difficult or impossible."[58] Conceding that the context of behavorial use often clears up ambiguities,[59] the writer continued: "The greater the ambiguity or vagueness or uncertainty of a rule to begin with, the more unfair its application is apt to seem from an individual's point of view, 'bad' man or good."[60]

The bulk of litigation involving issues of the meaning of words in legal documents arises because of either vagueness or semantic ambiguity rather than because of syntactic ambiguity.[61] A draftsman should not minimize the importance of acquiring a practical working knowledge of good English usage and syntax[62] just because the probability is higher that his document might be tested on semantic rather than syntactic grounds.

Much ambiguity disappears when the equivocal word or phrase is read in the entire context of the instrument. Nevertheless, "context, however valuable, does not resolve all doubts and correct all imprecisions."[63] The prevailing approach in construction of unclear legal documents was probably best expressed by one court which emphasized that it was mostly concerned with content and context, yet recognized the value of both syntax and, to a lesser degree, punctuation:

> The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the *arrangement of its words* what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. *The sense of the contract is gathered from its words and their relation to each other,* and, after that has been done, *punctuation may be used to more readily point out* the division in the sentences and parts of sentences. But the words control the punctuation marks, and not the punctuation marks the words.[64]

---

[57] One attorney underscored the apparent comparative lack of influence that semantics has had on the legal profession, asserting: "[L]awyers throughout the profession, including the judiciary, are anything but careful in their choice and use of words." Miller, *supra* note 54, at 34 n.41.

[58] Probert, *supra* note 54, at 263.

[59] *Id.* at 261.

[60] *Id.* at 272.

[61] *See, e.g.,* Allen, *Symbolic Logic and Law: A Reply,* 15 J. LEGAL ED. 47, 50 (1962); Summers, *supra* note 56, at 490; Tammelo, *Syntactic Ambiguity, Conceptual Vagueness, and the Lawyer's Hard Thinking,* 15 J. LEGAL ED. 56 (1962) [hereinafter cited as Tammelo].

[62] Hershman, *Writing with Clarity and Conciseness,* 15 PRAC. LAW., March 1969, at 45 [hereinafter cited as Hershman]. *See also* W. STRUNK & E. WHITE, THE ELEMENTS OF STYLE 22 (1959): "The position of the words in a sentence is the principal means of showing their relationship . . . . The writer must, therefore, so far as possible, bring together the words, and groups of words, that are related in thought, and keep apart those that are not so related."

[63] Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A.J. 310 (1960).

[64] Holmes v. Phenix Ins. Co., 98 F. 240, 242 (8th Cir. 1899) (emphasis added).

C. *Punctuation*

The draftsman should note that there have been scattered instances in which punctuation has been deemed by courts to be a significant element in the determination of the case. For example, it has been observed by the Supreme Court of the United States that "the matter of punctuation is never relied upon to defeat the obvious intent; but, when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it."[65] Moreover, the United States Court of Appeals for the Sixth Circuit has taken this broader position: "Although punctuation is not to be permitted to control meaning where the text is clear, it may become, in case of ambiguity, the controlling guide to proper interpretation."[66]

The Supreme Court of Iowa has followed a similar approach regarding construction of faulty punctuation in a will contest: "Although punctuation may be taken into consideration in construing a will and may aid in ascertaining intent, the natural sense in which words are used must prevail over punctuation."[67] The specific devise in question read to X, "the life use of the following . . . the North fractional Half of the Northeast Quarter of Section Five [80 acres] . . . , together with forty acres of our interest in the South Half of the Southwest Quarter [40 acres] . . . , and the West Half of the Northeast Quarter [80 acres] . . . ." The trial court had granted the specific devisees' application to have two 80-acre tracts of land, plus a 40-acre tract, set off to them from the residuary estate, the court determining that the testamentary devise was clear and unambiguous, thus precluding the admission of extrinsic evidence proferred by the residuary devisee to the effect that testator intended the specific devisees to have only one of the 80-acre tracts, plus the 40-acre tract.

The supreme court determined, however, that the use of a comma between two descriptions in the devise created ambiguity as to testator's intent, thus allowing the admission of extrinsic evidence to resolve doubt arising from the language used. Reversing and remanding the cause, the supreme court determined from the extrinsic evidence that testator intended the specific devisees to receive only one of the 80-acre tracts, plus the 40-acre tract, with the other 80-acre tract to pass to the residuary devisee. Thus, if the comma had not been used ambiguously, then the door would have remained closed on the introduction of extrinsic evidence, since the intention of the testator must be ascertained from the will only when the will is not ambiguous.[68]

The draftsman would be well advised to consider punctuation as an important element in the development of well-written legal instruments.[69] Punc-

---

[65] Joy v. St. Louis, 138 U.S. 1, 32 (1891).
[66] Travelers Indem. Co. v. Pray, 204 F.2d 821, 824 (6th Cir. 1953).
[67] *In re* Estate of Thompson, 164 N.W.2d 141, 147-48 (Iowa 1969).
[68] For an analysis of cases considering punctuation in the construction of contracts and wills, *see* Annot., 3 A.L.R. 1062 (1919) and 70 A.L.R.2d 215 (1960), respectively.
[69] "Decisions on statutory construction . . . may be expected to place more em-

tuation should be mastered as a tool to be used as "a finishing device, together with other typographical aids, in carrying meaning."[70] Punctuation should not, however, be relied on solely to do what a correct arrangement of words can do.[71] An elementary way of reducing syntactic ambiguity arising from improper arrangement of words would be to use greater care in the use of coordinating conjunctions.

III. Coordinating Conjunctions

Coordinating conjunctions are form words that are used between words, phrases, clauses, or sentences to connect elements "equal in grammatical rank and substantially equivalent in thought." The principal coordinating conjunctions are "and," "but," "for," "nor," "or," and "yet."[72] The focus of attention in the following discussion will be upon the use of "and," "or," and the hybrid "and/or."[73]

A. *"And"*

"And,"[74] the most used connective, can mean a conjunction of items, a summary of items, or a disjunction of items. Its typical use is in joining in a series two or more elements of equal grammatical rank.[75]

In its conjunctive sense, "and" connects words or phrases in such a relation that the latter word or phrase is to be added or taken along with the former word or phrase.[76] In other words, a person may do *both* this *and* that.[77] "And," denoting a joinder or a union,[78] is used to conjoin a word with a word, a clause with a clause, or a sentence with a sentence. "And" thus is used in its conjunctive sense to bind together words, phrases, or sentences as relating the one element to the other,[79] the connected elements sometimes being of similar meaning or import and sometimes not.[80]

---

phasis on grammar and punctuation in determining the meaning intended" whereas "[i]n considering wills, perhaps a little greater inclination by the court to change or correct the writing may be noted." Crandell, *The Unlettered Lawyer: A Solicitor and His Syntax Are Soon Parted*, 41 Mich. S.B.J. 26, 33 (1962).

70 Dickerson, *supra* note 14, at 117.

71 For an account of Abner Kneeland's bizarre conviction for blasphemy in 1833 because of, *inter alia*, his omission of a comma in his writing, "Universalists believe in a god which I do not," *see* A. Schlesinger, The Age of Jackson 356-59 (1946).

72 Perrin, *supra* note 23, at 483-84.

73 For a case synopsis of judicial construction of the words "and," "or," and "and/or," in specific areas of law, *see, e.g.*, 16 C.J.S. *Constitutional Law* § 19 (1956); 17A C.J.S. *Contracts* § 304 (1963); 42 C.J.S. *Indictments and Informations* § 101 (1944); 62 C.J.S. *Municipal Corporations* § 442 (1949); 82 C.J.S. *Statutes* § 335 (1953); and 95 C.J.S. *Wills* § 613 (1957).

74 *See generally* 3 C.J.S. *And* 1067 (1936); 3 Words & Phrases *And* 569 (1953).

75 Perrin, *supra* note 23, at 429.

76 *In re* Application of Rapid Film Service, Inc., 181 Neb. 1, 4, 146 N.W.2d 563, 565 (1966).

77 Alexander v. State, 84 Tex. Crim. 75, 78, 204 S.W. 644, 646 (1918).

78 Michigan Public Serv. Co. v. City of Cheboygan, 324 Mich. 309, 341, 37 N.W.2d 116, 129 (1949).

79 Hailey v. County Bd. of School Trustees, 21 Ill. App. 2d 105, 112, 157 N.E.2d 570, 574 (1959).

80 *See* cases cited at 3 C.J.S. *And* 1067 (1936).

have used at least six methods for interpreting the meaning of the form word "or": literal interpretation, interpretation based on intent, common meaning, interpretation suggested by technical terms, dictionary meaning, and context.[99] Thus, the draftsman should not hesitate to spell out in detail exactly what he intends, rather than revering brevity at the expense of completeness.[100] He should not be adverse to saying "A or B, or both" or "A or B, but not both" when this specificity is needed to make the meaning clear. For example, the draftsman of a criminal statute would be well advised to state expressly that a specified offense shall be punishable by a fine or imprisonment, *or both*—thus making it clear that the court can select one of these: (1) a fine, (2) imprisonment, or (3) both a fine and imprisonment.[101] This complete wording should effectively preclude any challenge by a convicted defendant that his sentence must only be *either* a fine *or* imprisonment but not both.[102]

On the other hand, the draftsman should not overparticularize when it is not necessary. For example, an attorney is being overcautious when he pleads that his client in a paternity suit is not the father of the said twins "or of *either* of them."[103] Moreover, overparticularization can change the whole meaning of an instrument. For example, the Criminal Court of Appeals of Oklahoma reversed a conviction because of a faulty jury instruction based on overparticularized language in a statute relating to sale of narcotics.[104] The statute prescribed a penalty of a fine and imprisonment, "or both." The jury was instructed that if they found him guilty, they were to fix the amount of the fine *and* the length of the imprisonment. The appellate court, applying the principle of statutory construction that effect should be given to all parts of the statute, held that the terminal phrase "or both" necessitated construction of what otherwise would have been a conjunctive "and" (fine "and" imprisonment) to mean the disjunctive "or." Otherwise, the "or both" phrase would be meaningless. The trial judge thus erred in instructing the jury that the prescribed punishment was both a fine and imprisonment.

An especially perplexing problem in the use of "and" and "or" can arise when it is unclear from the context whether the draftsman attempted an enumeration of two classes of people or an enumeration of two identifying characteristics of one person. An example is the phrase, "every husband and father." The draftsman intending an enumeration of people should say "every husband and every father" or "every person who is either a husband or a father." On the other hand, the draftsman intending an enumeration of one person's characteristics should say, "every person who is both a husband and a father."[105]

---

99 BRYANT, *supra* note 7, at 244.
100 Goldberg, *Hints on Draftsmanship*, 5 PRAC. LAW., March 1969, at 42.
101 *Cf.* IOWA CODE §§ 689.11, 694.1 (1966).
102 Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A.J. 310, 311 (1960).
103 Hershman, *supra* note 62, at 45.
104 Baker v. State, 36 Okla. Crim. 328, 329, 254 P. 512, 513 (1927).

C. *"And" and "Or" Used Interchangeably*

Ordinarily the words "and" and "or" are not interchangeable, the former being primarily conjunctive in nature and the latter being primarily disjunctive. Nevertheless, the word "and" is sometimes construed in the disjunctive sense, and "or" is sometimes used conjunctively, in order to effectuate the intention of the parties to the written instrument.[106]

Judicial construction of "or" to mean "and," and of "and" to mean "or," is usually done only when absolutely necessary to reconcile an ambiguity or to rectify an obvious mistake, in carrying out the clear intent of the parties as shown by the whole context and the surrounding circumstances. That is, "or" is never taken to mean "and," and "and" is not taken to mean "or," unless the context requires such construction to prevent an absurd or unreasonable result.[107] For example, the Supreme Court of Errors of Connecticut construed "and" to mean "or" in a state statute permitting towns to authorize Sunday sales of liquor in "hotels, restaurants and clubs."[108] After a local city council had exercised its option by passing an ordinance permitting Sunday sales of liquor in hotels, the restaurant interests then argued that the authorization extended to them also. In other words, the state statute required that the city council authorize sales in all three types of establishments or in none at all. The court rejected this argument, noting that the meaning of the statutory phrase in question "cannot be determined by resort to a definition of the word 'and' per se but must be deduced from a consideration of the several pertinent statutory provisions indicative of the policy of the state in conferring upon each town certain rights of local option as to the sale of alcoholic liquor within its borders."[109]

In another situation, the Supreme Court of Mississippi substituted an "and" for an "or" to correct what it considered to be an obvious mistake in a state statute authorizing boards of supervisors to employ general advisory counsel on an annual basis or to employ special counsel on an ad hoc basis whenever a civil case arose in which the county was interested.[110] A local board had employed general advisory counsel, and then later employed plaintiff as special counsel to defend four civil suits against the county. The board's general advisory counsel recommended that plaintiff not be paid since the statute, read literally, established an either-or alternative of employing advisory counsel or special counsel on an ad hoc basis, but not both. Rejecting this argument, the court stated: "The obvious intent of the legislature was not to leave the

---

105 Dickerson, *The Difficult Choice Between "And" and "Or,"* 46 A.B.A.J. 310, 311 (1960).

106 Bradford v. Louisiana Public Serv. Comm'n, 189 La. 327, 338, 179 So. 442, 446 (1938).

107 *Id. See also* 3 C.J.S. *And* 1067, 1068 (1936) for an extensive listing of case citations to this effect.

108 Bania v. New Hartford, 138 Conn. 172, 83 A.2d 165 (1951).

109 *Id.* at 176, 83 A.2d at 167.

110 Board of Sup'rs v. Booth, 81 Miss. 267, 272-73, 32 So. 1000, 1001 (1902).

counties in the helpless condition of not being able to employ special counsel by reason of the previous employment of merely advisory counsel." The court reasoned that if the statute meant that the board could employ one or the other kind of counsel but not both, "then it inevitably follows that, if a board employs general advisory counsel, it never could during that year employ counsel in any civil or criminal case, no matter how vast the interests involved . . . ."[111]

D. *"And/Or"*

It is unclear whether the hybrid "and/or" was developed as an independent form word with its own grammatical value or whether it was conceived of primarily as a way of dealing with the dilemma of the multiple uses of the words "and" and "or."[112] It is clear, however, that "and/or" has not been accepted to any significant degree, but rather has been sharply critized by judges[113] and commentators[114] since it was first involved in litigation in 1854.

In the first case, three English judges split in three directions while interpreting an agreement calling for a ". . . full and complete cargo of sugar, mollasses and/or other lawful produce" (that is, "A, B, and/or C"). One judge felt the shipper could load A and B and C, or A and B, or C only. Another judge felt the options were A and B and C, or A and B. The third judge felt that the contract could be fulfilled by loading A and B alone.[115]

In 1875, three other English judges interpreted the same type of "A, B, and/or C" contract in three more ways, thus making a total of six different interpretations by six judges of the same type of contract provision. The three interpretations in the later case were: (1) one of the three sets of cargoes, A or B or C, (2) A, or A and B, or A and C, and (3) A or B or C, or any combination.[116]

One writer,[117] synthesizing court interpretations and legal commentary, lists these as the possible meanings of "and/or": (1) "every possibility imaginable with *and* alone plus every possibility imaginable with *or* alone;" (2) "all

---

[111] *Id.* at 272, 32 So. at 1001.

[112] The phrase "and/or" apparently originated over a century ago in English mercantile and marine insurance contracts. McCarty, *That Hybrid "And/Or,"* 39 MICH. S.B.J. 9 (1960) [hereinafter cited as McCarty].

[113] About 100 cases are cited in exhaustive annotations on "and/or" in American Law Reports. See Annot., 118 A.L.R. 1367 (1939) and Annot., 154 A.L.R. 866 (1945). For example, the Iowa supreme court has stated: "This court should be glad to do anything it properly can do to discourage use by the legislature of the hybrid 'and/or.'" Rysink v. Board of Sup'rs, 229 Iowa 1240, 1245, 296 N.W. 376, 378 (1941). McCarty, *supra* note 112, at 10, observed: "Decisions in other states apparently strongly support this position of the Iowa Supreme Court."

[114] *E.g.*, Editorial, *"And/Or,"* 18 A.B.A.J. 456 (1932); Editorial, *And/Or-Iana,* 18 A.B.A.J. 524 (1932); *An And/Or Symposium,* 18 A.B.A.J. 574 (1932); McCarty, *supra* note 112; Welch, *And/Or,* 44 MASS. L.Q., July 1959, at 98.

[115] Cuthbert v. Cumming, 156 Eng. Rep. 668 (Ex. D. 1855), *aff'd,* 156 Eng. Rep. 889 (Ex. Ch. 1855) as discussed at MELLINKOFF, *supra* note 2, at 151.

[116] Stanton v. Richardson, 45 L.J.O.B. (H.L. 1875) as discussed at MELLINKOFF, *supra* note 2, at 151-52.

[117] MELLINKOFF, *supra* note 2, at 307-08.

of those possibilities, and is to be construed . . . as will best accord with the equity of the situation;" (3) "some, but not all, of the possibilities are included" (but with disagreement on what to include); (4) "either *and* or *or* but cannot mean both;" or (5) "meaningless."

Against such a backdrop of confusion and criticism, the draftsman should heed this admonition about the use of "and/or" from the American Bar Association: "Until there is a general accord as to its meaning, can it be safely used?"[118]

Nevertheless, draftsmen continue to use "and/or" in all types of legal documents. The courts tend to be more tolerant of "and/or" in contracts than in any other kind of legal document.[119] For example, the Supreme Court of Louisiana has stated what appears to be the general opinion of the courts:

> When ["and/or" is] used in a contract, the intention is that the one word or the other may be taken accordingly as the one or the other will best effect the purpose of the parties as gathered from the contract taken as a whole. In other words, such an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such interpretation as will best accord with the equity of the situation, and for that purpose to use either "and" *or* "or" and be *held down to neither* . . . .[120]

The Supreme Court of California, expressing a somewhat similar opinion, pointed out some advantages and disadvantages of using "and/or" in contracts, stating: "[T]he expression ["and/or"] has proved convenient in contracts and other instruments where, by its intentional equivocation, it can anticipate alternative possibilities without the cumbersome itemization of each one. . . . It lends itself, however, as much to ambiguity as to brevity. Thus, it cannot intelligibly be used to fix the occurrence of past events."[121]

On the other hand, the use of "and/or" in practically any other type of legal document has led to scathing criticism by appellate courts. One judge fired the broadside, "I confess I do not know what is meant by the use of the phrase 'and/or.' There is no reason why a statute, contract or legal document of any kind cannot be stated in plain English. The use of the symbol 'and/or' has been condemned by some courts and should be condemned by every court."[122]

Courts have been especially critical of the use of "and/or" in pleadings.[123]

---

118 Editorial, *An And/Or Symposium*, 18 A.B.A.J. 574, 575 (1932).

119 On the other hand, "and/or" has been considered to be "meaningless" in a city ordinance. *See* City of Washington v. Washington Oil Co., 346 Mo. 1183, 1186, 145 S.W.2d 366 (1940).

120 State v. Dudley, 159 La. 872, 878, 106 So. 364, 365 (1925).

121 *Ex Parte* Bell, 19 Cal. 2d 488, 499, 122 P.2d 22, 29 (1942).

122 State *ex rel.* Adler v. Douglas, 339 Mo. 187, 189, 95 S.W.2d 1179, 1180 (1936).

123 McCarty, *supra* note 112, at 10. For example, the position has been taken that an "and/or" allegation in a pleading, "[s]tanding alone and construed most strongly against the pleader . . . should in most cases be subject to special demurrer and in some instances it might render the whole pleading subject to general demurrer." In this particular case, however, there were other, unequivocal allegations sufficient to save the pleading from a demurrer. *See* Henderson v. Nolting First Mortg. Corp., 184 Ga. 724, 734, 193 S.E.

The Supreme Court of Wisconsin left no doubt about its extreme displeasure over the use of "and/or":

> [W]e are confronted with the task of first construing "and/or," that *befuddling*, nameless thing, that *Janus-faced verbal 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 interest of their clients. . . .[124]

The possible consequences of using "and/or" in a particularly delicate situation are not limited merely to verbal reprisal from the bench. Cases have been lost because of injudicious use of "and/or." For example, a judgment in a malpractice suit was reversed when the Court of Appeals of Georgia declared invalid a jury instruction defining the standard of care as "such care and/or skill and/or diligence as . . . is ordinarily employed by the profession generally in this locality." Declaring that the law required the physician to exhibit *both* care and skill, the court determined that "and/or" in the instruction was defective for merely requiring "either care or skill and not both."[125]

The use of "and/or" in a search warrant has been declared fatal, rendering the warrant invalid and the evidence obtained thereunder inadmissible.[126] The allegation in the affidavit for the search warrant and in the search warrant itself indefinitely described the owner or occupant of the premises sought to be searched for intoxicating liquors as "being the premises occupied by, in charge of and under the control of Willie Wilson, and/or Eddie J. Ford." The Court of Criminal Appeals of Texas noted: "The sufficiency of the allegation of occupancy and ownership is attacked as being so indefinite as to constitute no allegation whatever because the use of the expression, 'and/or,' is equivocal and is neither positively conjunctive nor positively disjunctive."[127]

Appellate courts in several instances have declared jury verdicts to be faulty because of the uncertainty engendered in them by the use of "and/or." For example, convictions have been reversed because of uncertainty when a jury verdict finding the defendant guilty assessed the punishment at a fine and/or imprisonment.[128] Moreover, a judgment has been set aside because the trial court assessed both a fine and imprisonment after the jury verdict assessed punishment at a fine and/or imprisonment.[129] In this latter case, the appellate

---

347, 352 (1937). *See also* Hays v. McCarty, 239 Ala. 400, 404, 195 So. 241, 245 (1940); Lee v. Douglas Gibbons & Co., 258 App. Div. 717, 718, 14 N.Y.S.2d 938, 939 (Sup. Ct. 1939).

[124] Employers' Mut. Liability Ins. Co. v. Tollefsen, 219 Wis. 434, 437, 263 N.W. 376, 377 (1935) (emphasis added).

[125] Kuttner v. Swanson, 59 Ga. App. 818, 820, 2 S.E.2d 230, 232 (1939).

[126] Wood v. State, 156 Tex. Crim. 419, 243 S.W.2d 31 (1951).

[127] 243 S.W.2d at 33.

[128] Cobb v. State, 139 Tex. Crim. 337, 338, 139 S.W.2d 272, 273 (1940); James v. State, 139 Tex. Crim. 208, 210, 139 S.W.2d 587, 588 (1940).

[129] Allen v. State, 138 Tex. Crim. 303, 306, 136 S.W.2d 232, 233 (1940).

court also admonished the trial court for even accepting the jury's verdict containing such uncertain language.[130]

Some grammarians also are sharply critical of "and/or,"[131] with one writer observing: "The good-usage people are all critical of it, though in varying degrees, with the weathervane school declaring it validated by mass use."[132] Yet, a linguist, without discussing usage of "and/or," incidentally wrote: "A linguist may or may not be proficient in speaking and/or writing a variety of languages."[133]

"And/or" claims some devout defenders, however.[134] One writer suggested two reasons for its use: (1) for brevity and (2) for denoting shades of difference in meanings of words. He suggested that it is considerably easier to say ship me some rice "during the months of March and/or April" rather than the more lengthy, ship me some rice "in March or in April, or in both March and April, whichever is most convenient." On the second point, he argued that in an instruction to the jury to find that rice was shipped "upon the request of and/or demand of the defendant" the flexibility of the "and/or" allows for difference in juror reaction regarding two similar terms, request and demand. The "and" joins the terms "request" and "demand" whose connotations differ while also indicating it was the intention of the speaker to include both. The "or" would indicate that "request" and "demand" denote the same set of facts.[135]

There appears to be no valid reason to resort to this aberration, "and/or," in light of the widespread confusion about its meaning. Moreover, semantic laxity regarding "and/or" might have been responsible for the limited introduction into legal documents of such weird combination as "or/and," "is/was," "was/were," "it/he," "its/his," "it/him," and "for/to."[136]

Thus, the draftsman must choose his coordinating conjunctions carefully, and should not hesitate to spell out clearly what he intends when he uses them. In this connection, he can easily gain more clarity by dropping altogether the use of "and/or."

IV. Symbolic Logic

With this linguistic background in mind, the legal draftsman should be cognizant of the necessity for consciously avoiding syntactic ambiguity. One

---

130 *Id.*

131 *E.g.*, "The ugly device of writing x and/or y to save the trouble of writing x or y or both of them is common and convenient in some kinds of official, legal, and business documents, but should not be allowed outside them." H. Fowler, Modern English Usage 29 (2d ed. 1965). "Such words [as "and/or"] are out of place in Formal writing . . . ." Perrin, *supra* note 23, at 443.

132 Mellinkoff, *supra* note 2, at 306-07.

133 P. Lamb, Linguistics in Proper Perspective 3 (1967) [hereinafter cited as Lamb].

134 *E.g.*, Note, *Meaning of Words "And/Or,"* 20 Marq. L. Rev. 101 (1936); Note, *In Defense of "And/Or,"* 45 Yale L.J. 918 (1936).

135 Note, *In Defense of "And/Or,"* 45 Yale L.J. 918, 918-19 (1936).

136 Mellinkoff, *supra* note 2, at 317, *citing* cases and authorities.

way he can do this is by adding symbolic logic to his kit of communicational tools.[137]

Professor Allen has done the most extensive examinations on how certain elementary notions of symbolic logic can be utilized in legal draftsmanship.[138] He designed the method of systematic pulverization, as a definitive means of structuring legal draftsmanship on principles embodied in six elementary logical connectives. Systematic pulverization consists of a four-stage transformation of an ordinary statement into systematically-pulverized form: "A. pulverizing the statement into its constituent elements, B. rearranging the elements into approximately the form of an implication [if A—then B], C. discovering the appropriate schematic form, D. writing the statement in systematically-pulverized form."[139]

The logical connective basic to systematic pulverization is implication, which is the "if—then" relationship between two propositions. This relationship of implication is alternatively expressed as "P implies Q," and can be represented graphically as $\frac{P}{Q}$.[140] Allen uses as an illustration of transforming a statement into an implication his thesis regarding the use of symbolic logic: "The development of a more systematic method of drafting will enable the lawyer to communicate his intended meaning more effectively." This statement can be systematically pulverized as follows. First, the statement is rearranged in the approximate form of an implication:

> If a more systematic method of drafting can be developed, then the lawyer will be able to communicate his intended meaning more effectively.

Then, the revised statement is pulverized into its constituent elements:

> P. a more systematic method of drafting can be developed
> Q. the lawyer will be able to communicate his intended meaning more effectively.

Next, the appropriate schematic design is decided upon, in this case being $\frac{P}{Q}$ as an implication with P (the antecedent) implying Q (the consequent). Finally, the revised statement is expressed in systematically-pulverized form:

---

[137] Logic is "the study of the methods and principles used in distinguishing correct (good) from incorrect (bad) arguments." I. COPI, SYMBOLIC LOGIC 1 (1954) [hereinafter cited as COPI]. Symbolic logic "treats formal logic by means of a formalized artificial language or symbolic calculus whose purpose is to avoid the ambiguities and logical inadequacies of natural languages." *Vocabulary*, 1965 M.U.L.L. 71.

[138] *E.g.*, L. Allen, *Usefulness of Modern Logic to the Readers and Writers of Legal Documents*, in COMMUNICATION SCIENCES AND LAW: REFLECTIONS FROM THE JURIMETRICS CONFERENCE (L. Allen & M. Caldwell, eds. 1965); Allen, *Deontic Logic*, 1960 M.U.L.L. 13; Allen, *Some Uses of Symbolic Logic in Law Practice*, 8 PRAC. LAW., May 1962, at 51, 1962 M.U.L.L. 119; Allen, *Symbolic Logic and Law: A Reply*, 15 J. LEGAL ED. 47 (1962); Allen, *supra* note 53; Allen & Caldwell, *Modern Logic and Judicial Decision Making: A Sketch of One View*, 28 LAW & CONTEMP. PROB. 213 (1963); and Allen & Orechkoff, *Toward A More Systematic Drafting and Interpreting of the Internal Revenue Code: Expenses, Losses and Bad Debts*, 25 U. CHI. L. REV. 1 (1957).

[139] Allen, *supra* note 53, at 836.

[140] An implication "does not assert either that its antecedent is true or that its consequent is true; it asserts only that *if* its antecedent is true then its consequent is true also, that is, that its antecedent *implies* its consequent." COPI, *supra* note 137, at 16.

1. A more systematic method of drafting can be developed

2. THE LAWYER WILL THEN BE ABLE TO COMMUNICATE HIS INTENDED MEANING MORE EFFECTIVELY.[141]

Applied to legal draftsmanship, the process of systematic pulverization can aid the draftsman in avoiding inadvertent syntactic ambiguity. The draftsman should recognize that something is faulty if, after he has systematically pulverized his statement, he finds that the consequent proposition (Q) does not in fact logically follow from the antecedent proposition (P). That is, if in a relationship of implication P does not imply Q, then the original statement is faulty, thus alerting the draftsman to the need for redrafting his original statement to nail down his intent.

A second logical connective employed in symbolic logic is that of conjunction, defined by Allen as "the logical relationship between two subsidiary propositions that are joined by the idea expressed by the word 'and' in a statement such as: 'Roses are red AND violets are blue.' "[142] If either proposition is false then the compound statement is false, since the compound statement can be true only if both propositions are true.[143] The advantage of using the principle of conjunction becomes more apparent when there are conjunctive antecedents (P_1 and P_2) or conjunctive consequents (Q_1 and Q_2) or both. Once the statement is put in systematically-pulverized form, the draftsman then will be faced with deciding whether, for example, P_1 implies *both* Q_1 and Q_2.

A third logical connective is that of coimplication, which is the conjunction of two implications—"P implies Q" and "*not* P implies *not* Q." Since the latter implication is equivalent to the implication "Q implies P," then P and Q imply each other.[144] In other words, the implication "if P—then Q" is converted into the coimplication "*if and only if* P—then Q." The following sentence can serve as an illustration of both implication and coimplication: "A landowner has a duty to warn business invitees of hidden dangers on his premises."[145] Expressed as an implication, the sentence would read: "If X is a landowner, then he has a duty to warn any business invitee of hidden dangers on the premises." Expressed as a coimplication, the sentence would read: "If, and only if, X is a landowner, then he has the duty to warn any business invitee of hidden dangers on the premises." Cognizant of these two varying interpretations of his sentence, the draftsman can now choose whether he intentionally wants to remain vague by leaving the sentence as it originally was (that is, "if P—then Q") or whether he wants to avoid what otherwise would have been inadvertant syntactic ambiguity by inserting the phrase "and only if" in the original sentence (that is, "if and only if P—then Q").

---

141 Allen, *supra* note 53, at 833-36.

142 *Id.* at 837.

143 "A conjunction is true if both its conjuncts are true, but false otherwise." COPI, *supra* note 137, at 11.

144 F. FITCH, SYMBOLIC LOGIC: AN INTRODUCTION 37 (1952) [hereinafter cited as FITCH].

145 Cullison, *An Orientation for Formalized Hohfeldian Analysis*, 1966 M.U.L.L. 58, at 62.

The fourth and fifth logical connectives relate to the principle of disjunction. An "exclusive disjunction" is a statement that "asserts the truth of one or the other of its two subsidiary propositions, but not both." An "inclusive disjunction" is a statement that "asserts that one or the other, *or both*, of its subsidiary propositions are true."[146] The utility of these connectives relating to "or" is similar to the utility of using the principle of conjunction relating to "and," as discussed above. In other words, the draftsman, after systematically pulverizing statements with constituent elements connected by the word "or," can then come to grips with which case of "or" he intended.

The sixth logical connective used in symbolic logic is that of negation. The principle of negation is involved in a statement "whenever the idea ordinarily expressed by the word 'not' is present in that statement."[147] "The negation of any true statement is false, and the negation of any false statement is true."[148] A simple example of negation is saying, "This lease is not renewable" —rather than saying, "This lease is unrenewable," or "It is false that this lease is renewable," or "It is not true that this lease is renewable," or "It is not the case that this lease is renewable." The first phrase emphasizes the presence of negation, thus lessening the chances that the reader will miss the negativeness intended in the communication.[149]

Negation can be used in some situations to avoid vagueness that otherwise could defeat the draftsman's purpose. Thinking that he was putting a stop to hunting on his land, a farmer once posted a sign on his barn reading "Please do not ask permission to hunt." Upon his return from town, he was dismayed to finds his woods full of hunters who said "We thought you just didn't want to be bothered."[150] The farmer should have used negation in structuring the wording of his sign, saying "Hunting not allowed." If he wanted to be even more explicit, he could have stated his intent in the form of the command "Do not hunt!" In following the latter approach, he would be using an imperative with a stronger tonal effect than negation, which (like all propositions in logic) can only be used in the form of a declarative.[151]

The use of symbolic logic is confined primarily to aiding the draftsman in detecting inadvertent syntactic ambiguity, and has little application in the detection of the more prevalent language inadequacies of semantical ambiguity, contextual ambiguity, or conceptual vagueness.[152] Nevertheless, problems of

---

146 Allen, *supra* note 53, at 847; *accord*, COPI, *supra* note 137, at 13: "A disjunction which uses the inclusive 'or' asserts that at least one disjunct is true, while one which uses the exclusive 'or' asserts that at least one disjunct is true and at least one disjunct is false." (emphasis omitted).

147 Allen, *supra* note 53, at 848.

148 I. COPI, INTRODUCTION TO LOGIC 223 (1953).

149 FITCH, *supra* note 144, at 53.

150 Christie, *supra* note 20, at 887 n.3.

151 COPI, *supra* note 137, at 3, 5.

152 Summers, *supra* note 56, at 490; Summers, *Symbolic Logic and Law: A Reply to Professors Allen and Tammelo*, 15 J. LEGAL ED. 60 (1962). *But see* Tammelo, *supra* note 61, at 57: "I consider symbolic logic of very consequential value . . . on many important and difficult problems of law. It is helpful not only where syntactic ambigui-

syntactical ambiguity are by no means inconsequential in legal disputes.[153] Various authors have developed elaborate schematic illustrations demonstrating how symbolic logic can be used to detect and to prevent syntactic ambiguity in statutes,[154] contracts, wills, conveyances, regulations,[155] constitutions,[156] international agreements,[157] court doctrines,[158] and fact analyses of court opinions.[159]

Symbolic logic can be "a valuable aid in moving towards a more comprehensive and systematic method of interpretation"[160] by sharpening the draftsman's insight into legal concepts and by providing him with "reliable tests of the validity of arguments,"[161] both of his own and of his opponent's. Moreover, the use of symbolic logic in detecting syntactic ambiguity can be useful in "suggesting alternative situations or arguments."[162] Thus, the draftsman would be well advised to pursue at least a minimal working knowledge of symbolic logic for use in those situations in which a high degree of clarity appears to be most essential to fulfilling his intent.[163]

V. Conclusion

Courts appear to make every effort in examining the context of any written instrument to extract the meaning "as it would be understood by a typical member of the audience to which it is addressed." The draftsman is thus faced with saying "what he means according to the standards of communication current in the relevant speech community."[164]

Absolute clarity in writing is not attainable. The draftsman seeks "the highest practicable degree of clarity that gets the message across to the typical member of his audience and to the skeptical reader in those situations in which courts want to be doubly sure that a probable result of some severity was

---

ties occur in the text of the law, but also where attempts are made to remove conceptual vagueness and to decide what the law is when the lawyers are confronted with an 'open texture' of law."

153 Allen, *Symbolic Logic and Law: A Reply*, 15 J. Legal Ed. 47, 50 (1962); Tammelo, *supra* note 61, at 56; *cf.* Summers *supra* note 56, at 486: "[S]ymbolic logic as used by Mr. Allen, is of inconsequential value to most lawyers."

154 *E.g.*, Allen, *supra* note 53; Allen & Orechkoff, *Toward a More Systematic Drafting and Interpreting of the Internal Revenue Code: Expenses, Losses and Bad* debts, 25 U. Chi. L. Rev. 1 (1957); Stern, *Syntactic Ambiguity in the Clayton Act, Section 5 (a)*, 1960 M.U.L.L. 129.

155 *E.g.* , Allen, *supra* note 53.

156 Ely, *The Limits of Logic*, 1963 M.U.L.L. 117.

157 Miller, *Two Examples of Syntactic Ambiguities in International Agreements*, 1962 M.U.L.L. 72.

158 Menke, *Symbolic Logic and Judicial Communication*, 1966 M.U.L.L. 78 [hereinafter cited as Menke].

159 Allen & Caldwell, *Modern Logic and Judicial Decision Making: A Sketch of One View*, 28 Law & Contemp. Prob. 213 (1963).

160 Allen, *supra* note 53, at 833.

161 Delagrave, *Can the Formulas of Modern Logic Help Solve Legal Problems?* 1964 M.U.L.L. 50, 51.

162 Menke, *supra* note 158, at 79.

163 *See* Lawlor, *Bibliography, Introduction of Symbolic Logic to Lawyers*, 1959 M.U.L.L. 47.

164 Dickerson, *supra* note 14, at 32.

actually intended."[165]

The draftsman's ultimate goals thus should be to eliminate all ambiguity and to limit vagueness to "only those borderline cases that are individually insignificant and unlikely to occur often enough to create a significant administrative burden that could be avoided by more specific drafting."[166] In other words, the draftsman must be able to recognize when there is "any significant possibility that his language will be misread by the typical reader" and then he should "try to remove the uncertainty or reduce it to relative insignificance."[167]

The quality of every written communication depends upon the effectiveness of the writer in conveying meaning to the reader.[168] That is, playback must agree to as great an extent as possible with input, thus "producing in the reader the same thought reaction that motivated the writer to use the symbols he did to express that thought."[169] To seek this goal, the draftsman should have at least a minimal working knowledge of both linguistics[170] and logic[171] to enable him to understand the English language more thoroughly as well as methods for manipulating the language to convey logical thought processes.[172]

The message of the importance of clarity in writing apparently has not gotten through to the legal profession yet, as evidenced by the fact that ambiguous wording "continues to be the source of innumerable lawsuits."[173] The American Bar Foundation made a potentially significant contribution to future clarity in legal draftsmanship when it commissioned the preparation of a comprehensive reference book which was appropriately styled *The Fundamentals of Legal Drafting*.[174] Mastery of that study, which was published in 1965, could go a long way toward solving many of the legal draftsman's communicational problems.[175]

KERMIT L. DUNAHOO

---

165 *Id.* at 33.
166 *Id.* at 43.
167 *Id.* at 32.
168 "Meaning is not in words until someone puts it there." Probert, *supra* note 54, at 269. However, words do carry a common level of meaning in the community.
169 Goldstein, *Writing to be Understood*, 15 PRAC. LAW., March 1969, at 34.
170 Linguistics is "the scientific study of language [which] may concentrate on the sounds of language (phonology), the origin and changing meaning of words (etymology and semantics), or the arrangements of words in a meaningful context in different languages (syntax-structural or transformational grammar)." LAMB, *supra* note 133, at 3-4.
171 Note 137 *infra*.
172 As a linguist, the draftsman would be "a student of human languages who specializes in understanding and describing the basic processes of languages—their structures or grammars and their sounds." LAMB, *supra* note 133, at 3-4. As a logician, the draftsman would not be concerned with the actual process of reasoning, but with "the correctness of the completed process." His question would always be: "[D]oes the conclusion reached *follow* from the premises used or assumed?" COPI, *supra* note 137, at 2.
173 H. WEIHOFEN, LEGAL WRITING STYLE 77 (1961).
174 "The object was to distill a body of principles covering matters of form, style, directness, and brevity that would be useful to draftsmen generally, and could thus apply to all kinds of definitive legal instruments—legislative bills, contracts, wills, leases, indentures, ordinances, and all the rest." DICKERSON, *supra* note 14, at xi.
175 For general references on good grammar, *see, e.g.*, S. BAKER, THE COMPLETE STYLIST (1966); P. PERRIN, WRITER'S GUIDE AND INDEX TO ENGLISH (4th ed. 1965); W. STRUNK & E. WHITE, THE ELEMENTS OF STYLE (1959); H. WEIHOFEN, LEGAL WRITING STYLE (1961); *Writing It Right: A Symposium*, 15 PRAC. LAW., March 1969, at 33.