

The Case of the Serial Comma: What Can Plain-Language Drafting Tell Legislative Drafters?

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*O'Connor v. Oakhurst Dairy*¹ will eternally be known as “the \$10 Million Serial-Comma Case.” A Google search yields screaming headlines from *The New York Times*,² *The New Yorker*,³ National Public Radio,⁴ and other national and international broadcast, online, and print media,⁵ all trumpeting the costly consequences of a legislative drafter’s punctuation error. *The Onion* weighed in with a satirical headline (“4 Copy Editors Killed in Ongoing AP Style, Chicago Manual Gang Violence”) and a fake news article reporting that “an innocent 35-year-old passerby who found himself caught up in a long-winded dispute

¹ 851 F.3d 69 (1st Cir. 2017).

² Daniel Victor, *Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute*, N.Y. Times (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/oxford-comma-lawsuit.html?_r=0.

³ Mary Norris, *A Few Words About That Ten-Million-Dollar Serial Comma*, New Yorker (Mar. 17, 2017), <https://www.newyorker.com/culture/culture-desk/a-few-words-about-that-ten-million-dollar-serial-comma>.

⁴ Anna King, *The \$10 Million Lawsuit That Hinges on an Oxford Comma, All Things Considered*, NPR (Mar. 23, 2017, 4:41 PM), <https://www.npr.org/2017/03/23/521274657/the-10-million-lawsuit-that-hinges-on-an-oxford-comma>.

⁵ See, e.g., Elena Cresci, *Oxford Comma Helps Drivers Win Dispute About Overtime Pay*, Guardian (Mar. 16, 2017), <https://www.theguardian.com/books/2017/mar/16/oxford-comma-helps-drivers-win-dispute-about-overtime-pay>; Mignon Fogarty, *The \$10 Million Comma*, Quick and Dirty Tips (Mar. 20, 2017), <http://www.quickanddirtytips.com/education/grammar/the-10-million-comma>; A.J. Willingham, *An Oxford Comma Changed This Court Case Completely*, CNN (Mar. 16, 2017), <http://www.cnn.com/2017/03/15/health/oxford-comma-maine-court-case-trnd/index.html>.

over use of the serial, or Oxford, comma had died of a self-inflicted gunshot wound.”⁶

The Serial-Comma Rule

The serial-comma (or Oxford-comma) rule requires a comma before a coordinating conjunction in a series with three or more items — as demonstrated by the comma after *National Public Radio* in the paragraph just above. Leaving out the serial comma invites misunderstanding. Consider the gushing teenager who — having just won *American Idol* — gives a shout-out of appreciation: “I want to thank my parents, Lady Gaga and Jesus Christ!” She really needs the serial comma after *Lady Gaga*.

The serial comma has long been a standard weapon in the arsenal of plain-language drafting.⁷ Most texts devoted expressly to drafting legislation or agency rules deploy the serial comma in the war against ambiguity.⁸ Use of the serial comma is overwhelmingly favored among drafting experts and in style guides.⁹ In most

⁶ 4 Copy Editors Killed in Ongoing AP Style, *Chicago Manual Gang Violence*, Onion (Jan. 7, 2013), <https://www.theonion.com/4-copy-editors-killed-in-ongoing-ap-style-chicago-manu-1819574341>.

⁷ Reed Dickerson, *The Fundamentals of Legal Drafting* 189 (2d ed. 1986) (advising drafters to use the serial comma and warning that its omission “may create syntactic ambiguity”); Richard C. Wydick & Amy E. Sloan, *Plain English for Lawyers* 81 (6th ed. 2005) (offering this elegantly different expression of the rule to make us think about meaning: “When a sentence contains a series of three or more items joined with one conjunction, put commas after each item except the last.”).

⁸ See, e.g., Bryan A. Garner, *Guidelines for Drafting and Editing Legislation* 127 (2015); Robert J. Martineau & Michael B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English* 68 (2005); G.C. Thornton, *Legislative Drafting* 37 (4th ed. 1996).

⁹ Bryan A. Garner, *Don’t Know Much About Punctuation: Notes on a Stickler Wannabe*, 83 Tex. L. Rev. 1443, 1449 n.63 (2005) (documenting “the vast multitude of punctuation authorities” who favor the serial comma and citing further support for “the lopsided alignment of authorities” in Bryan A. Garner, *The Winning Brief* 293–95 (2d ed. 2004)). For commentary on a notable outlier, the

of the literature, the serial comma appears to have prevailed — but it was absent from the statute interpreted in *O'Connor*.

The *O'Connor* case generated considerable popular commentary and scholarly legal writing, with most articles espousing one of the following themes:

- (1) *On the Merits*: “The serial comma is (or isn’t) a good idea, so do (or don’t) use it.”¹⁰
- (2) *Emotions*: Advocates and detractors are passionate; they take the issue very seriously.¹¹
- (3) *Legal Mischief*: Cases generated by comma usage are all over the map and often lead to ludicrous results.¹²

Associated Press Style Guide, see Kelly Gurnett, *Take That, AP Style! Court of Law Rules the Oxford Comma Necessary*, Write Life (Apr. 10, 2017), <https://thewritelife.com/is-the-oxford-comma-necessary/>.

¹⁰ Cf. Elitza Meyer, *It’s Not the Oxford Comma, It’s the Ambiguity*, 8 Hous. L. Rev. 25 (2017); Nicholas R. O’Conner, *First Circuit Determines That a Lack of a Serial Comma Results in Contrasting Interpretations*, 36 Corp. Couns. Rev. 147, 148 (2017) (“A lesson taken from this decision for corporate and commercial attorneys is to include the comma in order to avoid ambiguity.”).

¹¹ Cf. Hilary Hanson, *A Missing Oxford Comma Decided This Ruling on Overtime Pay*, Huff. Post (Mar. 16, 2017), http://www.huffingtonpost.com/entry/oxford-comma-court-case-ruling-overtime_us_58cad41ae4b0ec9d29d9dd28 (noting that “[t]here’s not much that makes grammar and punctuation enthusiasts more hot and bothered than debates about Oxford commas”); Merrill Perlman, *Don’t Work Overtime: The Final Word on the Oxford Comma*, Colum. Journalism Rev. (Mar. 21, 2017), https://www.cjr.org/language_corner/oxford-comma.php (remarking that the serial comma “creates enemies out of best friends”). See also Walt Hickey, *Elitist, Superfluous, or Popular? We Polled Americans on the Oxford Comma*, FiveThirtyEight (June 17, 2014), <https://fivethirtyeight.com/datalab/elitist-superfluous-or-popular-we-polled-americans-on-the-oxford-comma/> (reporting that in 2014 polling data, 57% of respondents favored the use of a serial comma, while 47% opposed it).

¹² Cf. Douglas E. Abrams, *The Pesky Serial Comma*, 73 J. Mo. Bar 212, 213 (2017) (suggesting a “serial comma” legal search for federal and state decisions that “chronicle legal fees wasted, docket time consumed, and judicial ink spilled, all (as the *O'Connor* panel put it) ‘for want of a comma’”); Jonathan M. Stern, “*For Want of a Comma*”: *The Oxford Comma: Use It or Lose . . .*, 60 For the Def.

My article approaches *O'Connor* and the serial comma differently: not on the merits, not as a passionate divider of opinions, not as a matter of judicial construction — but rather as a vehicle for demonstrating how plain language helps drafters analyze and understand the texts they're drafting.

Conventional wisdom has it that plain-language drafting is reader-centered: its central mission is to aid reader comprehension.¹³ That's a correct but incomplete formulation. Less well noted but equally true is that plain-language drafting techniques assist drafters in understanding the texts they draft.¹⁴ *Clear understanding* by the drafter is an essential precursor to *clarity of expression* in drafting a text: "If you can't explain something simply, you don't understand it well enough."¹⁵ The serial comma and three other plain-language drafting techniques would have helped drafters unearth the intended meaning of the ambiguous

73, 73–74 (2018) (citing multiple cases with differing consequences flowing from comma usage, none so severe as the case of a man hanged by a comma: *Rex v. Casement* [1917] 1 K.B. 98 (Eng.), in which a man was found guilty of treason based on the placement of a comma in a statute).

¹³ See, e.g., Plain Language Action & Info. Network, <https://plainlanguage.gov/about/> (last visited May 8, 2020) (noting that "[p]lain language makes it *easier for the public* to read, understand, and use government communications") (emphasis added); Sec. & Exch. Comm'n, *A Plain English Handbook: How to Create Clear SEC Disclosure Documents* 9–10 (Aug. 1998), <https://www.sec.gov/pdf/handbook.pdf> (devoting its third chapter to "Knowing Your Audience," which it calls "the most important step in [en]suring that your document is understandable"); Plain English Campaign, <http://www.plainenglish.co.uk/> (last visited May 8, 2020) (explaining that Britain's Plain English Campaign is focused on "writing with the audience in mind"); Law Reform Comm'n of Victoria, *Plain English and the Law* (2017), https://www.lawreform.vic.gov.au/sites/default/files/Plain%20English%20and%20the%20Law-republished_forweb.pdf (urging that every "document be written in a style [that] readily conveys its message to its audience").

¹⁴ Thomas A. Murawski, *Writing Readable Regulations* xi (1999) ("Plain language helps writers as well as readers.").

¹⁵ This wisdom, though often erroneously attributed to Einstein, is nowhere to be found in the section of quotes "Attributable to Einstein" in *The New Quotable Einstein* 287 (Alice Calaprice ed., 2005).

provision *during* Maine’s legislative-drafting process, *before* it was presented to legislators and enacted.

Legal Impact and Origins of the Missing Comma

The *O’Connor* case concerned Maine’s labor law, which provided for time-and-a-half overtime pay but excluded workers engaged in the “canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution” of perishable food items, such as milk.¹⁶ When dairy-truck drivers sued Oakhurst Dairy for overtime back pay worth about \$10 million, the outcome turned on a missing comma.

Plain-language drafting recommends consistent use of a serial comma,¹⁷ but Maine’s practice differs. Its drafting manual first acknowledges widespread problems with comma usage: “Commas are probably the most misused and misunderstood punctuation marks in legal drafting and, perhaps, the English language.”¹⁸ The manual then, arguably, exacerbates the problem by confidently counseling against using the serial comma:

- A. Series.** Although authorities on punctuation may differ, when drafting Maine law or rules, don’t use a serial comma between the penultimate and the last item of a series.

Do not write:	Write:
Trailers, semitrailers, and pole trailers	Trailers, semitrailers and pole trailers

¹⁶ Me. Rev. Stat. Ann. tit. 26, § 664(3) (before 2017 amendments).

¹⁷ See, e.g., Bryan A. Garner, *A Dictionary of Modern Legal Usage* 731 (3d ed. 2011) (the serial-comma question “is easily answered in favor of including the final comma, for its omission may cause ambiguities, whereas its inclusion never will”).

¹⁸ Legislative Council, Me. State Legislature, *Maine Legislative Drafting Manual* 113 (1990), <http://maine.gov/legis/ros/manual/Draftman2009.pdf>.

If Maine's drafting manual had instead directed drafters to use the serial comma routinely, a drafter would have asked the policymaker, "Do you want the comma in or out before *or* in the series of tasks that exclude workers from overtime pay?" Before removing the "routine" serial comma, a drafter would have been *compelled* to pose the question and elicit essential guidance from the policymaker, thereby precluding a need for the *O'Connor* court to guess at the legislature's intended meaning.

Maine revised its drafting manual in October 2016, after the *O'Connor* lawsuit had been filed in 2014 but still half a year before the First Circuit's decision in March 2017. Its policy against serial-comma usage remained unchanged¹⁹ from the earlier, August 2009 incarnation. In their resistance to the use of a serial comma, Maine and six other states (Arizona, Massachusetts, New Mexico, Oregon, South Dakota, and West Virginia) constitute a distinct "minority among legislative drafting manuals online."²⁰ How will these drafting offices respond to the *O'Connor* decision? Thus far, only West Virginia has embraced the change: "The Legislature now uses the serial or 'Oxford' comma."²¹

Here's the metamessage of this article, as demonstrated by *O'Connor*: plain-language drafting techniques lead drafters into a deeper understanding of their own texts and will often illuminate policymakers' intent. Three other plain-language drafting techniques could also have helped Maine's legislative drafters perceive

¹⁹ Legislative Council, Me. State Legislature, *Maine Legislative Drafting Manual* 125 (2016), <http://maine.gov/legis/ros/manual/Draftman2009.pdf>.

²⁰ See Amy Langenfeld, *Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom*, 22 *Perspectives* 141, 144 (2014).

²¹ *West Virginia Legislature Bill Drafting Manual* 36 (2018). To monitor how other states are adapting in the post-*O'Connor* era, consult the National Conference of State Legislatures website for current versions of state legislative-drafting manuals. *Bill Drafting Manuals*, Nat'l Conference of State Legislatures, <https://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx> (last visited May 9, 2020).

the ambiguity problem before it precipitated a litigation challenge.

Tabulation and Parallelism

The contested language in *O'Connor* exempted various tasks from time-and-a-half compensation at Maine's "Overtime rate."²² The tasks, expressed in a series at the outset of the exemption, would not have accommodated tabulation as a matter of drafting style. But if used as an analytical tool, tabulation would have offered Maine's drafters beneficial insights by producing this vertical list:²³

- Canning
- Processing
- Preserving
- Freezing
- Drying
- Marketing
- Storing
- Packing for shipment or distribution

In accordance with this tabulation, the dairy-truck drivers in *O'Connor* were not engaged in "packing" perishable goods "for shipment or distribution," so they were legally entitled to overtime pay. But breaking the last item into two bullet points (*packing for shipment* and *distribution*) would have cost dairy-truck drivers their overtime pay: the drivers were indisputably engaged in "distribution" of a perishable food item, milk.

²² Tit. 26, § 664(3).

²³ See Martin Cutts, *Oxford Guide to Plain English* 81 (4th ed. 2013) (offering guidelines for the proper use of tabulation in a chapter entitled "Using Vertical Lists").

The principle of parallelism governs proper use of tabulation: all items in a series must be consistent in content and style.²⁴ The bullet points tabulated above are all grammatically consistent: each exempted activity begins with a gerund ending in *-ing*. Parallelism is violated, however, if the last bullet point is broken into two activities — *packing for shipment* (a gerund) and *distribution* (a noun). The use of tabulation and parallelism as analytical tools would have motivated Maine’s legislative drafters to pose meaningful questions to policymakers about their intent.

Use of *If-Then* Tables²⁵

If-then tables are very useful in deconstructing and decoding complex passages. They improve reader comprehension by using visual cues to make content more meaningful, breaking it down into understandable chunks of information. To create *if-then* tables, drafters must have a clear understanding of their text’s intended meaning. The seemingly simple provision in Maine’s labor law might not at first glance appear to need a clarifying *if-then* table. But consider how much clearer to the reader (and, importantly, to the drafter) the plain meaning of the text is when expressed in such a format.

²⁴ See *The Chicago Manual of Style* §§ 5.242–.245 (17th ed. 2017) (<https://www.chicagomanualofstyle.org/home.html>); cf. Thomas A. Murawski, *Writing Readable Regulations* 81 (1999).

²⁵ Cf. Murawski, *Writing Readable Regulations* at 39 (discussing use of *if-then* tables).

Use of *If-Then* Tables

Are Dairy-Truck Drivers Entitled to Overtime Pay?

IF they are engaged in	THEN
Packing for shipment or distribution	Dairy-truck drivers are entitled to 1.5 overtime pay because the drivers are not engaged in “packing” goods for shipment or distribution.
Packing for shipment, or Distribution	Dairy-truck drivers are not legally entitled to receive 1.5 overtime pay because they clearly are engaged in “distribution” of goods.

In the chart above, if the first item is the proper interpretation, then dairy-truck drivers *do* get overtime pay because the law describes a single task involving the “packing” of perishable food items for either “shipment or distribution.” But if the second items accurately describe what legislators intended, then dairy-truck drivers *do not* get overtime pay because they are surely involved in “distribution” of a perishable food item, milk. This table would likely never make its way into the legislative instrument, since the provision is not too complex or difficult to decipher; but both drafter and instrument could benefit from preparing an *if-then* chart during the drafting phase.²⁶ Using this plain-language drafting technique forces drafters to plumb the depths of intended meaning and provokes essential questions that the drafters must ask of policymakers.

²⁶ Sec. & Exch. Comm’n, *A Plain English Handbook* at 33 (providing further commentary on *if-then* usage).

Conclusion

This analysis of *O'Connor* is not offered primarily to persuade drafters that they should use the serial comma, tabulation and parallelism, or *if-then* charts, though all are worthy drafting techniques. If applied in Maine, any one of these drafting techniques would have forced drafters to get the text right the first time and would have saved the dairy company millions.²⁷ Moreover, these examples are not the only plain-language drafting devices that might contribute greater clarity to legislative drafting. Other champions of plain-language drafting — and its critics — should weigh in with their own recommended drafting strategies to enhance clarity and reader comprehension.²⁸

Both the champions and the critics of plain-language drafting should find common ground in a central thesis of this article: the drafting process is a two-way street that not only aids reader comprehension but also fosters drafters' own understanding of the text. Over 50 years ago, Reed Dickerson wrote about the interaction between the formal demands of writing and the drafter's substantive understanding of a text: "One of the virtues of intensive, systematic, and specialized across-the-board checks is that even where they are applied to what appear to be only stylistic aspects of the instrument they often expose substantive discrepancies," adding that "the systematic treatment of form is the means of substantive improvement."²⁹ Dickerson significantly expanded his observations about "A Strategy for Using Form to

²⁷ The \$10 million-comma case ultimately cost the employer half that amount. Daniel Victor, *Oxford Comma Dispute Is Settled as Maine Drivers Get \$5 Million*, N.Y. Times (Feb. 9, 2018), www.nytimes.com/2018/02/09/us/oxford-comma-mainef.html.

²⁸ See, e.g., Joseph Kimble, *Deep in the Weeds of Textualism*, 21 Green Bag 2d 297 (2018).

²⁹ Reed Dickerson, *The Fundamentals of Legal Drafting* 46, 47 (1965).

Improve Substance”³⁰ in a later edition, in which he called the dialogue between drafter and draft “talk back”: “in the course of writing, the author . . . soon finds that he is party to a two-way conversation with what he has put on paper.”³¹

This consideration of *O’Connor* and the various plain-language drafting techniques conveys a metamessage: plain-language drafting techniques illuminate policy problems that might not otherwise become clear to a drafter. *O’Connor* invites a particularly strong conclusion that plain-language techniques drive drafters to probe policymakers about a text’s deep and intended meaning during the drafting process, when the text can still be rewritten to avoid ambiguity — and save millions of dollars.

Epilogue

In 2017, the Maine legislature amended the law to make *packing for shipment* and *distributing* (a gerund) separate items in the list of activities excluded from overtime pay. The legislature strongly signaled that its original intent had always been to list them separately, since the amendment specified that it “applies retroactively to September 29, 1995 but does not apply to cases pending on March 12, 2017.” See tit. 26, § 664(3)(F).

Finally, in a punctuation exercise whose only purpose seemed to be defending the principle of “don’t use a serial comma,” Maine’s drafters substituted needlessly vigorous semicolons for the commas that had previously separated each of the single words in series — and then to avoid confusion dropped in an entirely new *serial semicolon* just before the conjunction: “The canning; processing; preserving; freezing; drying; marketing; storing; packing for shipment; or distributing . . .” *Id.* Except for appropriately converting “distribution” into a gerund, this statutory revision is truly a triumph of style over substance.

³⁰ Reed Dickerson, *The Fundamentals of Legal Drafting* 72 (2d ed. 1986).

³¹ *Id.* at 74.