
Style Is Substance: Collected Cases Showing Why It Matters

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Introduction

To some lawyers, writing style is a matter of personal taste, carrying no more weight than the morning's choice of a tie or shoes. But more than literary fashion is at stake when a legal writer puts fingers to keyboard. Whether a litigator toiling in the trenches, a legislative drafter shaping policy, or a transactional attorney greasing the gears of commerce, a lawyer can suffer substantive headaches if he or she doesn't write with care. Poor writing style can lose cases. It can pull the legs out from under codified law. It can turn "iron-clad" contract terms into tinfoil.

What proof is there? Plenty. Using a casebook format, this article collects cases in which the outcome — or some other significant aspect of the litigation — hinged on how lawyers wrote. (I've avoided cases involving pro se litigants or lay drafters.) The disputed writings in these cases run the gamut: pleadings, insurance policies, appellate briefs, statutes, leases, employment contracts, and more. With each court opinion, you'll see that the consequences of poor writing style are not abstract or hypothetical; they're real, affecting real parties in real cases.

Legalese

Legalese hinders clarity, and the judges who must wade through statutes, pleadings, briefs, and contracts are well aware of it.¹ Lawyers who think that judges are conditioned to happily accept legalese should think again. Courts have used adjectives like “tortured,”² “painful,”³ “incomprehensible,”⁴ “abstruse,”⁵ “opaque,”⁶ and “mind-numbing”⁷ to describe legalese. One United States Supreme Court Justice called legalese “Terrible!” and pointless.⁸ Another called it “pretentious.”⁹ Still another “can’t bear it.”¹⁰

So if you’re a lawyer who uses legalese, don’t be surprised if you submit a proposed order and the judge edits out the legalese

¹ See, e.g., *N.H. Ball Bearings, Inc. v. Jackson*, 969 A.2d 351, 362 (N.H. 2009) (“[L]egalese, at times, can obfuscate the underlying substance and meaning of words.”); *Sanders v. Ashland Oil, Inc.*, 696 So. 2d 1031, 1038 (La. App. 1st Cir. 1997) (“[W]e note that the agreement is poorly drafted and that the use of legalese, such as ‘aforesaid,’ makes the meaning of the contract terms unclear.”).

² *Weigner v. City of New York*, 852 F.2d 646, 656 (2d Cir. 1988).

³ *Johnson v. Revenue Mgt. Corp.*, 169 F.3d 1057, 1061 (7th Cir. 1999).

⁴ *Marrakush Soc’y v. N.J. St. Police*, 2009 WL 2366132 at *12 (D.N.J. July 30, 2009).

⁵ *Weigner*, 852 F.2d at 656.

⁶ *Canas v. City of Sunnyvale*, 2009 WL 2160572 at *5 (N.D. Cal. July 20, 2009).

⁷ *Lorenz v. CSX Corp.*, 736 F. Supp. 650, 656 (W.D. Pa. 1990).

⁸ Bryan Garner, Interview with Justice Stephen G. Breyer, 13 *Scribes J. Legal Writing* 145, 156 (2010).

⁹ Bryan Garner, Interview with Justice Anthony M. Kennedy, 13 *Scribes J. Legal Writing* 79, 98 (2010).

¹⁰ Bryan Garner, Interview with Justice Ruth Bader Ginsburg, 13 *Scribes J. Legal Writing* 133, 141 (2010).

before signing it.¹¹ Don't be surprised if a judge allows you to amend a pleading but instructs you to drop the legalese in the amended version.¹² And don't be surprised if a judge sanctions you for frustrating discovery with legalese-infused objections¹³ — or denies your motion to compel discovery because instead of drafting simple and direct requests, you made “overzealous use of legalese.”¹⁴

Some lawyers think they're playing it safe by rehashing stuffy old forms that are breeding grounds for legalese. If you are among those lawyers, beware: your safety net has a hole in it. Legalese actually makes your documents more vulnerable to attack, supplying ammunition to courts inclined to invalidate potentially harsh provisions. For example, legalese can doom exculpatory releases designed to avoid personal-injury suits.¹⁵ On the flip side, courts have cited the absence of legalese as a reason to enforce a release.¹⁶

¹¹ See, e.g., *Bank of Am. v. Washington*, 2009 WL 3229322 at *1 n. 1 (M.D. Ga. Oct. 1, 2009) (“Plaintiff’s counsel and Defendant HUD’s counsel submitted a proposed order containing excessive legalese. The Court has revised the form of that order so that it is more understandable.”).

¹² See, e.g., *Canas v. City of Sunnyvale*, 2009 WL 2160572 at *5 (N.D. Cal. July 20, 2009) (“[P]laintiffs’ complaint suffers from multiple defects, including its frequent recourse to opaque and formulaic legalese and its lack of structure. . . . Plaintiffs are urged to address these defects in any amended pleading . . .”).

¹³ See, e.g., *Trafton v. Rocketplane Kistler, Inc.*, 2009 WL 2251288 at *1 (E.D. Wis. July 22, 2009) (awarding the plaintiffs \$2,500 in legal fees for time spent “trying to make sense of” the defendants’ supplemental interrogatory responses, which “continue[d] to obfuscate matters by virtue of their multiple objections and their vexatiously legalese tone”).

¹⁴ *Williams v. Adams*, 2009 WL 1220311 at *12 (E.D. Cal. May 4, 2009).

¹⁵ See, e.g., *Tayar v. Camelback Ski Corp.*, 957 A.2d 281, 293 (Pa. Super. 2008), *appeal granted*, 8 A.3d 299 (Pa. 2010) (“If a business desires to market a product or service as safer, it should not then be able to disclaim the promise of safety through the use of boilerplate legalese; it must specifically and conspicuously disclaim the promise of safety.”).

¹⁶ See, e.g., *Smith v. Amedisys, Inc.*, 298 F.3d 434, 444 (5th Cir. 2002).

The employment setting provides another example of legalese unraveling a drafter's plans. Employment manuals sometimes contain disclaimers stating that employees are employed at will and therefore can be fired with or without cause. Would a lawyer drafting this type of disclaimer be wise to avoid legalese? Below is one court's unanimous answer. (In this and the other extracts that follow, the formatting is generally not changed from the original.)

NICOSIA v. WAKEFERN FOOD CORP.

New Jersey Supreme Court, 1994

643 A.2d 554

HANDLER, J.

Wakefern[, the employer,] contends that its employment manual contained a disclaimer that negated the enforceability of the termination provisions . . . on which [its former employee,] Nicosia[,] relies.

An effective disclaimer by the employer may overcome the implication that its employment manual constitutes an enforceable contract of employment. *Woolley, supra*, 99 N.J. at 309, 491 A.2d 1257. The purpose of such a disclaimer is to provide adequate notice to an employee that she or he is employed only at will and is subject to termination without cause. . . . An employer can make such a disclaimer by

the inclusion in a very prominent position of an appropriate statement . . . that the employer continues to have the absolute power to fire anyone with or without good cause. [*Ibid.*]

The disclaimer relied on by Wakefern provides:

A. Introduction

This manual contains statements of Wakefern Food Corp. and its subsidiaries' Human Resource policies and procedures. (Hereafter referred to as "the Company"). The terms and procedures contained therein are not contractual and are subject to change and interpretation at the sole discretion of the Company, and without prior notice or consideration to any employee.

Woolley stressed that a disclaimer must be clear. . . . Although *Woolley* does not require the use of specific language for an effective disclaimer, it does require that a disclaimer make clear "that the employer continues to have the absolute power to fire anyone with or without cause." 99 N.J. at 309, 491 A.2d 1257

The Appellate Division, in *Preston*, . . . addressed the *Woolley* requirement for an "appropriate statement" that disclaims the binding effect of the terms and conditions set forth in an employment manual. The *Preston* court stated that an effective disclaimer must expressly "advise its employees that they could be discharged at will." *Id.* at 87, 555 A.2d 12. In so doing, "the language in the disclaimer must indicate, in straightforward terms, that the employee is subject to discharge at will." *Id.* at 85, 555 A.2d 12.

Wakefern's disclaimer language fails to constitute an "appropriate statement" under *Woolley* because it does not use "straightforward terms." . . . Instead, it contains "confusing legalese," such as the terms "not contractual," "subject to . . . interpretation," and "consideration." . . . Wakefern uses "language that a lawyer would understand, but that an employee would not equate with the objectives of . . . *Woolley*." Nicosia should not be expected to understand that Wakefern's characterization of its manual as "not contractual" or "subject to change and interpretation at the sole discretion of the Company" meant that the employer, despite the discipline and termination provisions of its manual, reserved the

“absolute power to fire anyone with or without cause” without actually changing those provisions.

Notes & Questions

1. Is legalese self-defeating for lawyers drafting consumer documents? See *Tenney v. Deutsche Bank Trust Corp.*, in which the court refused to enforce a bank’s “Certificate of Confirmation of Notice of Right to Rescind,” which was “drafted in legalese that [was] unnecessarily convoluted and difficult for the average consumer to read.”¹⁷ Given the legalese and other shortcomings, the court held that the certificate violated the Truth in Lending Act because it “would confuse and mislead the average consumer.”¹⁸

2. The federal government has been a leader in the plain-English movement. In the late 1970s, the Federal Communications Commission rewrote some of its regulations to replace confusing legalese with plain English.¹⁹ In 1998, the Securities and Exchange Commission adopted *A Plain English Handbook—How to Create Clear SEC Disclosure Documents*.²⁰ In 2003, the Federal Aviation Administration issued Order 1000.36, which adopted writing standards designed to “communicate clearly . . . and in plain language” rather than with “dense and needlessly complex” language.²¹ Other

¹⁷ 2009 WL 415510 at *4 (D. Mass. Jan. 26, 2009).

¹⁸ *Id.* at *5.

¹⁹ See Joseph Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* 107–08 (Carolina Academic Press 2012).

²⁰ Available at <http://www.sec.gov/pdf/handbook.pdf>.

²¹ Foreword to FAA Writing Standards, FAA Order No. 1000.36, at 1 (U.S. DOT, FAA Mar. 31, 2003) (available at http://www.faa.gov/documentlibrary/media/order/branding_writing/order1000_36.pdf).

agencies have taken similar steps.²² And in 2010, Congress enacted the most groundbreaking plain-language directive to date: the Plain Writing Act of 2010. The Act requires federal agencies to use “plain writing” in their documents, meaning “writing that is clear, concise, [and] well-organized, and follows other best practices appropriate to the subject or field and intended audience.”²³

Verbosity

A New York judge perhaps captured it best: “verbosity is impolite.”²⁴ Verbosity’s taxing effect on readers has spawned numerous court rules — both state and federal — aimed at snuffing it out. Court rules may limit the number of pages, words, or lines allowed in briefs.²⁵ They may also require nonrepetitive pleadings with “clear, concise, and direct” allegations.²⁶

The most notable antiverbosity rule is probably Federal Rule of Civil Procedure 8, which requires plaintiffs to give “a short and plain statement of the claim.”²⁷ This rule reflects that rambling, unwieldy complaints are “an unwelcome and wholly unnecessary

²² See Kimble, *supra* n. 19, at 80, 108–12 (describing U.S. Department of Veterans Affairs form-letters project).

²³ <http://centerforplainlanguage.org/plain-writing-laws/plain-writing-act-of-2010/>; for the story behind the Act, see Annetta Cheek, *The Plain Writing Act of 2010: Getting Democracy to Work for You*, 90 Mich. B.J. 52 (Oct. 2011).

²⁴ Gerald Lebovits, *The Department of Redundancy Department: Concision and Succinctness — Part I*, 78 N.Y. St. B.J. 64, 64 (July–Aug. 2006).

²⁵ See, e.g., Fed. R. App. P. 27(d)(2) (page limit for motions and replies), 32(a)(7)(A) (page limit for appeal briefs), 32(a)(7)(B) (alternative word or line limits for appeal briefs).

²⁶ Mich. Ct. R. 2.111(A)(1).

²⁷ Fed. R. Civ. P. 8(a)(2).

strain on defendants and on the court system.”²⁸ Defendants also must fall in line. Rule 8 compels them to state their defenses in “short and plain terms” — another unmistakable cry for brevity.²⁹ Similar language is found in local federal rules on motions and briefs. Consider this local rule for the District of Colorado: “Motions, responses, and replies shall be concise. A verbose, redundant, ungrammatical, or unintelligible motion, response, or reply may be stricken or returned for revision, and its filing may be grounds for imposing sanctions.”³⁰

The Federal Rules of Appellate Procedure strike the same tone. Brief-writers must “briefly” describe the nature of their cases, give “succinct” argument summaries, give “concise” statements of the standard of review, and include “short” conclusions.³¹

Litigators should view these brevity rules as allies rather than enemies. Verbosity may be tempting, but it ultimately hurts the writer’s cause. Judges buried under piles of verbose briefs may have trouble figuring out something as elementary as what issues need to be decided.³² And writers who drown judges in “a wide sea of verbosity” make it less likely that individual claims “can be segregated for individualized analysis.”³³ In other words, verbosity is verboten, unless a lawyer actually *hopes* to confuse readers.

²⁸ *In re Buffets, Inc. Secs. Litig.*, 906 F. Supp. 1293, 1298 (D. Minn. 1995) (quoting *In re GlenFed, Inc.*, 42 F.3d 1541, 1553–54 (9th Cir. 1994)).

²⁹ Fed. R. Civ. P. 8(b)(1)(A).

³⁰ D.C. Colo. L. Civ. R. 7.1(H).

³¹ Fed. R. App. P. 28(a)(6), (a)(8), (a)(9)(B), (a)(10).

³² See, e.g., *Lamoureux v. Anazahealth Corp.*, 2009 WL 813977 at *3 (D. Conn. Mar. 26, 2009).

³³ *EEOC v. Corrections Corp. of Am.*, 2009 WL 650558 at *1 n. 3 (D. Colo. Mar. 12, 2009).

The antiverbosity rules have teeth. Courts have struck answers containing “verbose, argumentative, and redundant statements.”³⁴ And what about complaints that deviate from Rule 8’s “short and plain statement” mandate? Here’s what one court said:

PEABODY v. GRIGGS

U.S. District Court, District of Rhode Island, 2009
2009 WL 3200686

MARY M. LISI, Chief Judge.

This matter is before the Court on Plaintiffs’ response to an order to show cause why their second amended complaint should not be dismissed. . . . [T]his Court finds that Plaintiffs have failed to show cause why the second amended complaint should not be dismissed.

I. Background and Procedural History

. . . [Plaintiffs’] first amended complaint is an 18-count, 97-page, 538-paragraph document with 7 exhibits attached, totaling an additional 36 pages. . . .

. . . Defendants filed motions to dismiss the first amended complaint. . . . [T]his Court determined that the first amended complaint was in violation of the “short and plain statement” requirement of Fed.R.Civ.P. 8. This Court dismissed the amended complaint without prejudice and gave Plaintiffs until May 13, 2009, to file a second amended complaint that complied with the Federal Rules of Civil Procedure. [Footnote omitted.]

. . . [Plaintiffs’] second amended complaint includes 13 counts laid out in 380 paragraphs over 73 pages. Additionally, 6 exhibits, totaling 22 additional pages, are attached to the complaint. . . . [T]his

³⁴ *Temperato v. Rainbolt*, 22 F.R.D. 57, 58 (E.D. Ill. 1958).

Court issued an order directing Plaintiffs to show cause in writing why the second amended complaint should not be dismissed for failure to comply with Fed.R.Civ.P. 8(a)(2). . . .

IV. The Second Amended Complaint

. . . Plaintiffs contend that the complaint is lengthy because they had to reconcile the requirements of Rule 8 and Rule 9 and because the facts underlying the complaint involve a RICO claim. Plaintiffs stress that the second amended complaint is “substantially reduced in length” as compared to the first amended complaint. . . .

Plaintiffs’ assertion that the second amended complaint is substantially reduced in length misses the mark. Length alone is not the issue. This complaint is simply not a “short and plain statement of the claim.” Fed.R.Civ.P. 8(a)(2). The second amended complaint contains 380 paragraphs over 73 pages and it specifically incorporates by reference 6 exhibits (22 additional single-spaced pages) containing approximately 316 additional factual averments. [Footnote omitted.] When viewed in its totality, the complaint is a rambling, fact-laden, disjointed “quagmire of minutiae.” *Kuchay v. Vetter*, No. 06 C 4501, 2007 WL 2410333 at *1 (N.D.Ill. Aug. 20, 2007) (internal quotation marks and citation omitted). The complaint is replete with irrelevant, repetitive, and incomprehensible factual averments that saddle Defendants with the unfair task of meeting their obligation to “admit or deny the allegations asserted . . . by an opposing party.” Fed.R.Civ.P. 8(b)(1)(B). The complaint also forces this Court to parse countless irrelevant and wholly unnecessary factual allegations to attempt to determine what Plaintiffs are alleging against each Defendant.

. . . .

Plaintiffs argue that the second amended complaint is necessarily long because of the RICO claim and Rule 9’s requirements. Although Rule 9 requires Plaintiffs to plead a RICO claim with

particularity, Rule 9 is not a license to submit to the Court an unrestrained fact inundated opus. . . .

This complaint is in no way, shape, or form a short and plain statement of the claim; rather, it is a conglomeration of allegations made unintelligible by its volume, morass of irrelevancies, lack of clarity and its incorporation-by-reference information overload. The complaint does not give Defendants fair notice of the claims and clearly will cause Defendants to expend significant and unnecessary effort to separate the wheat from the chaff in order to draft a reasoned response.

. . . .

. . . The Court therefore dismisses this complaint; such dismissal is without prejudice. Should Plaintiffs elect to file a new complaint they may do so only upon the condition that Plaintiffs first pay a counsel fee to Defendants to make them whole for the time and effort spent in responding to the first and second amended complaints.

For the reasons outlined above, Plaintiffs' second amended complaint is DISMISSED for failure to comply with Fed.R.Civ.P. 8(a)(2).
SO ORDERED

Notes & Questions

1. Some courts have hesitated to dismiss complaints based on verbosity alone.³⁵ Yet the *Peabody* court has plenty of company in opting for dismissal. For instance, in *Mann v. Boatwright*,³⁶ the Tenth Circuit affirmed dismissal because the plaintiff, a licensed attorney acting in pro per, filed a complaint so long and convoluted that no judge could be expected to decipher it:

³⁵ See, e.g., *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1131 (9th Cir. 2008).

³⁶ 477 F.3d 1140, 1148 (10th Cir. 2007).

Although [the plaintiff] is a licensed attorney in the State of Illinois, she has curiously eschewed the traditional pleading style characterized by a short recitation of the facts followed by claims for relief. Instead, her first and only “Claim For Relief” . . . goes on for 463 paragraphs spanning 83 pages, and yet it neither identifies a concrete legal theory nor targets a particular defendant. She requests specific relief at the end of her pleading, but by this point not even the most attentive of readers could figure out who did what to whom. In short, it hardly matters whether the district court dismissed Beverly’s complaint because it believed all of her claims were barred by *Rooker-Feldman* or simply because it could not separate the wheat from the chaff. It was not the district court’s job to stitch together cognizable claims for relief from the wholly deficient pleading that [the plaintiff] filed. As we have frequently noted, we are loath to reverse a district court for refusing to do the litigant’s job. [Footnote omitted.]

Likewise, the court in *Madison v. First Magnus Financial Corp.* found that the plaintiff’s first amended complaint fell “far short of satisfying the requirements of Rules 8 and 10” and was not “sufficient to survive a Rule 12(b)(6) motion to dismiss.”³⁷ The plaintiff did “not provide a ‘short and plain statement’ for each claim.”³⁸ Rather, the amended complaint was “verbose, amorphous, and conclusory, without presenting necessary facts in an understandable context.”³⁹

The same was true in *Sconiers v. California Dep’t of Social Services*,⁴⁰ where the court found that the plaintiff’s lengthy complaint violated Rule 8:

³⁷ 2009 WL 751603 at *3 (D. Ariz. Mar. 19, 2009).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 2008 WL 5245988 at *3 (E.D. Cal. Dec. 17, 2008).

Here Plaintiff's 828 page Complaint does not adequately identify grounds for relief against Defendants to satisfy Rule 8. Plaintiff's Complaint is verbose, confusing, argumentative and conclusory. Plaintiff's Complaint fails to state the elements of her claims plainly and succinctly and to provide Defendants with fair notice. . . . Plaintiff's Complaint fails to comply with the short and plain statement requirement of Rule 8 as it is 828 pages in length.

2. For a case striking a verbose brief, see *AIG Annuity Insurance Co. v. Law Offices of Theodore Coates, P.C.*,⁴¹ where the court struck the defendant's brief for violating a local rule requiring concise motions and responses:

At the outset, however, I note Defendant Coates's motion violates this court's local rules requiring that "motions, responses, and replies shall be concise," and warning that "[a] verbose, redundant, ungrammatical, or unintelligible motion, response, or reply may be stricken or returned for revision, and its filing may be grounds for imposing sanctions." See D.C. COLO. LCivR 7.1(H) (2008). . . . I strike Defendant Coates's response as noncompliant with this court's local rules, but decline to return this response for refiling because, as I explain below, Plaintiff's motion for discharge is premature. . . . Nonetheless, I note that any future filings of this ilk, should Defendant Coates disregard my exhortations to engage separate counsel, may be grounds for sanctions pursuant to this same rule.

3. Verbosity has also backfired on attorneys handling criminal cases. Consider *Gidney v. State*,⁴² where the court found that a criminal-defense attorney committed "an abuse of procedure" because his posttrial motion was so verbose:

⁴¹ 2008 WL 4079982 at *6, *9 (D. Colo. Sept. 2, 2008).

⁴² 925 So. 2d 1076, 1077 (Fla. 4th Dist. App. 2006).

Florida Rule of Criminal Procedure 3.850(c)(6), requires the post-conviction motion to include a “brief statement of the facts (and other conditions) relied on in support of the motion.” Appellant’s motion and supporting memoranda of law are excessively verbose. The memoranda of law are not simply a discussion of relevant case law, but an exceedingly long and repetitious discussion of the facts supporting his claims. Because he did not paginate his memoranda of law, we can only estimate that the filing exceeds 250 pages. Considering that Gidney entered a plea in this case and that the issues he raises are not complex, his excessive motion is an abuse of procedure. There is no reason it should take several hundred pages for him to explain his claims. [Footnotes omitted.]

4. For more cases taking lawyers to task for verbosity, see chapter 5 of Judith D. Fischer’s excellent book *Pleasing the Court: Writing Ethical and Effective Briefs* (2d ed., Carolina Academic Press 2011).

Run-On Sentences

For this article, I’ll use the phrase “run-on sentence” in the way that most people commonly use it — as a shorthand reference to unreasonably long, convoluted sentences. (Technically, a run-on sentence is one in which independent clauses are fused together without any punctuation and without a coordinating conjunction.⁴³ Some of the offending sentences in the cases discussed below, although vexing, don’t fit that definition.)

Run-on sentences can come back to bite litigators and transactional attorneys alike. For litigators, run-on sentences can undermine

⁴³ See Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 792 (3d ed., Oxford U. Press 2011).

motions and briefs, clouding arguments and eroding credibility.⁴⁴ The same is true for discovery requests. Consider, for example, the party whose discovery request failed because it described the sought-after documents “in a single, run-on sentence covering more than a full page and including a non-exclusive (‘without limitation’) listing of 24 separate types of information.”⁴⁵ This rambling definition was “so complex, broad and burdensome on its face,” the reviewing court observed, “as to defy either a rational response by parties receiving these requests or an evaluation by this court.”⁴⁶ Another court sanctioned a party \$2,500 for blocking discovery with vexatious nonresponses, the most notable being an interrogatory answer that contained multiple objections followed by “a few turgid run-on sentences that would cause a high school English teacher to blush.”⁴⁷

For legal drafters, run-on sentences jeopardize clarity and, in some cases, enforceability. For instance, a court may be reluctant to enforce a potentially harsh contractual provision, such as an indemnity clause in a consumer document, if that provision is “buried at the end of a run-on sentence.”⁴⁸ Even attempts at plain-English releases can be undone by sentence length. The Wisconsin Court

⁴⁴ See, e.g., *Cal. DHI, Inc. v. Erasmus*, 2008 WL 821778 at *5 (D. Colo. Mar. 26, 2008) (“This argument is difficult to parse: each paragraph consists of a single run-on sentence, and the verb tenses and apparent subject of each sentence shift abruptly and repeatedly.”).

⁴⁵ *In re Pabst Licensing GmbH Patent Litig.*, 2001 WL 797315 at *19 (E.D. La. July 21, 2001).

⁴⁶ *Id.*

⁴⁷ *Trafton v. Rocketplane Kistler, Inc.*, 2009 WL 2251288 at *1 (E.D. Wis. July 22, 2009).

⁴⁸ *Madsen v. Wyo. River Trips, Inc.*, 31 F. Supp. 2d 1321, 1324 (D. Wyo. 1999) (“But this indemnification provision was buried at the end of a run-on sentence (in very small print) in which the entire focus of the sentence was that Mr. Madsen was only signing on behalf of he [sic] and his minor children.”).

of Appeals refused to enforce release language couched in “a 176-word run-on sentence.”⁴⁹ Even though the sentence was “not packed with legalese,” it still lacked clarity and thus did not unambiguously encompass the accident at issue.⁵⁰

Legislators are notorious for their heavy use of run-on sentences, making life difficult for lawyers and judges trying to determine legislative intent. Consider one poor judge who had to tame a statute “consist[ing] of a single run-on sentence of more than 250 words.”⁵¹ In his effort to capture the statute’s meaning, the judge was forced to tabulate it within his opinion, much like a law student working on a classroom exercise.⁵²

The Maine Supreme Court was recently divided on the intended meaning of a statutory definition that “consist[ed] of a single, seventy-seven word run-on sentence that contain[ed] thirteen commas and employ[ed] the disjunctive ‘or’ eight times.”⁵³ The court’s majority settled on an interpretation that alarmed the Maine Legislature, which moved swiftly to undo the court’s decision. Acknowledging that “there may be confusion in the application of the existing statutory definition,” the legislature declared “an emergency within the meaning of the Constitution of Maine,” requiring

⁴⁹ *Cass v. Am. Home Assurance Co.*, 699 N.W.2d 254 (table), 2005 WL 1119783 at *2 (Wis. App. May 10, 2005).

⁵⁰ *Id.*

⁵¹ *Roberts v. Crowley*, 538 F. Supp. 2d 413, 418 n. 6 (D. Mass. 2008).

⁵² *Id.* at 418–19.

⁵³ *Whitney v. Wal-Mart Stores, Inc.*, 895 A.2d 309, 318–19 (Me. 2006) (Levy, J., dissenting), *superseded by statute*, 5 Me. Rev. Stat. Ann. § 4553-A (Westlaw current through 2011 2d Reg. Sess.); *see also* Me. Legis. Serv., ch. 385, Legis. Doc. 1027, Sen. Paper 344, 123d Leg., 1st Reg. Sess. (June 21, 2007).

new legislation “immediately.”⁵⁴ The legislature then amended the definition by tabulating it into a vertical list of numbered and lettered subparts.⁵⁵ Although the legislature did not explicitly own up to its carelessness in drafting the original version, its emergency amendment tacitly confirmed one justice’s quip that the original run-on provision was “not a model of legislative clarity.”⁵⁶

Run-on sentences sometimes infect even the explanatory comments that are designed to help judges and lawyers unearth a statute’s intended meaning. Consider one jurisprudential saga in which federal and state courts looked to a statute’s explanatory comment for help, only to be confounded by an incomprehensible run-on sentence. The case, *Horton v. Alexander* (below), was a complex one involving alleged fraud by corporate insiders. Just before filing bankruptcy, a family-owned corporation transferred over \$200,000 of corporate money to pay off family members’ personal debts. During the bankruptcy case, the corporation’s unsecured creditors tried to use Alabama’s Fraudulent Transfer Act to get that money back from the recipients so that it would be available to creditors.

The creditors’ case hinged on how the court interpreted the Act’s “good-faith transferee” provision. That provision protects good-faith transferees who, in exchange for receiving a payment from the bankruptcy debtor, give some value to the debtor “or to another person.” But what does “or to another person” mean? The United States District Court struggled with this question and, as you’ll see, got no relief from the statute’s explanatory comment:

⁵⁴ Emergency preamble to 5 Me. Rev. Stat. Ann. § 4553-A, contained in Me. Legis. Serv., ch. 385, Legis. Doc. 1027, Sen. Paper 344, 123d Leg., 1st Reg. Sess. (June 21, 2007).

⁵⁵ See 5 Me. Rev. Stat. Ann. § 4553-A (Westlaw current through 2011 2d Reg. Sess.).

⁵⁶ *Whitney*, 895 A.2d at 318 (Levy, J., dissenting).

HORTON v. ALEXANDER

U.S. District Court, Middle District of Alabama

2006 WL 3742175

W. HAROLD ALBRITTON, Senior United States District Judge.

. . .

No case law exists explaining the rationale for the additional “or to another person” language in § 8-9A-8(d). There is a Comment [footnote omitted] accompanying this statute that attempts to explain the significance of the additional language. It must be noted, however, that this Comment is poorly drafted, or poorly transcribed and edited, thereby providing little insight into what was the intent of the legislature. The Comment states that:

This language is merely to clarify the fact that a good faith transferee is protected to the extent of value given by the transferee to one other than the debtor is effectively a transfer for the debtor to the one who receives the value, this transfer may under proper circumstances be a fraudulent transfer. •

As one can easily see, this Comment makes little sense as written. It is a run-on sentence, leaving out a subject that could significantly alter the overall meaning of the language. Thus, the Comment creates confusion as opposed to answering any questions. . . .

The interpretation of Ala.Code § 8-9A-8(d) is critical in determining the liability, if any, of the transferees in this case. It is a question of state law of first impression, has far-reaching effect, and ultimately is unclear. . . . Therefore, considering the uncertainty of the relevant state law, the court finds that the appropriate action is to certify [the] question regarding the interpretation of § 8-9A-8(d) to the Supreme Court of Alabama.

~ ~ ~

After agreeing to consider the certified question, the Alabama Supreme Court likewise looked to the Act’s explanatory comment for help — only to suffer the same frustration as the federal court:

HORTON v. ALEXANDER

Alabama Supreme Court, 2007

977 So. 2d 462

LYONS, Justice

This Court is asked to construe § 8-9A-8(d), which reads as follows:

“Notwithstanding voidability of a transfer under this chapter, a good-faith transferee is entitled, to the extent of the value given the debtor for the transfer *or to another person* as a consequence of the debtor’s making such transfer, to

“(1) A lien on or a right to retain any interest in the asset transferred; or

“(2) A reduction in the amount of the liability on the judgment.”

(Emphasis added.)

Because we are dealing with the Uniform Fraudulent Transfer Act (“the UFTA”), we could ordinarily find persuasive authority from other jurisdictions construing similar language. However, that simple solution is unavailable because the emphasized language set forth above is unique to Alabama. Ordinarily in such a situation we would look to the Alabama Comment for an explanation of the reason for the deviation from the model act. However, nothing about this statute is ordinary.

The applicable portion of the Alabama Comment states:

“3. The language, ‘or to another person as a consequence of the debtor’s making such transfer[,] to’ is added to the Uniform Act in subsection (d) of this section. This language is merely to clarify the fact that a good faith transferee is protected to extent of value given by the transferee to one other than the debtor is effectively a transfer for the debtor to the one who receives the value, this transfer may under proper circumstances be a fraudulent transfer. . . .”

The second sentence begins with a tantalizing introductory phrase that suggests that clarification will follow, but the sentence then breaks down into an incomprehensible juxtaposition of unintelligible phrases.

. . .

. . . [U]nder what we consider to be the plain meaning of the exception in § 8-9A-8(d), a transferee acting in good faith under circumstances by which the transfer of the debtor’s assets confers value on a person other than the transferee will be able to avoid repayment. Further, although the Alabama Comment can perhaps be charitably described as ambiguous, it cannot trump an unambiguous statute.

. . .

. . . [W]e are unable to conclude that § 8-9A-8(d), affording expanded relief to a good-faith transferee, apparently at odds with the general purpose of the Act, reaches an absurd result wholly beyond the reasonable contemplation of the legislature. . . . Any dissatisfaction with the consequences of the plain meaning of § 8-9A-8(d) is a matter for the legislature.

Notes & Questions

1. As of this writing, the Alabama Legislature has not amended its Fraudulent Transfer Act to clarify the provision at issue in

Horton. The Alabama explanatory comment also remains unchanged — even though two courts have called it an “unintelligible” run-on sentence that “makes little sense as written.”

2. Would a careful edit of the Alabama explanatory comment have spared the *Horton* parties thousands of dollars in legal fees? Let’s assume a \$200 hourly rate for each party’s attorney. Let’s also assume that each party’s attorney spent at least 20 hours researching and briefing the issue for the bankruptcy court, 10 more hours doing the same for the United States District Court, and 20 more hours for the Alabama Supreme Court. Using these figures, the fees for researching and briefing this issue would have been at least \$10,000 per party. This figure doesn’t include fees for the lawyers’ time spent preparing for and making oral arguments in the three courts. Surely that would be another 15 hours. And it doesn’t include the parties’ out-of-pocket costs.

3. In *Stanard v. Nygren*,⁵⁷ the Seventh Circuit affirmed a district court’s refusal to allow a second amended complaint when the proposed complaint was “next to impossible” to decipher. Along with being verbose and riddled with grammar, punctuation, and spelling errors, the proposed complaint contained more than 20 sentences with 100 or more words, including sentences of 291, 345, and 385 words.

Passive Voice

Most writers recall learning, at one time or another, to prefer the active voice and to generally avoid the passive voice. Legal writers should pay special attention to this advice, for the passive voice can

⁵⁷ 658 F.3d 792, 799–800 (7th Cir. 2011).

lead to more than just flabby prose. It can lead to ambiguity, which is the legal writer's sworn enemy. Indeed, one court described the passive voice as "a grammatical device that conceals as much as it reveals."⁵⁸

In an active-voice sentence, an explicit actor or logical agent precedes and performs the action described by the verb: *The buyer rejected the shipment*. With the passive voice, the actor comes after the action, which gives the sentence a backward (and often wordy) feel: *The shipment was rejected by the buyer*. Worse still, when legal writers lapse into the passive voice, they sometimes forget to identify the actor altogether, giving that devil ambiguity the upper hand: *The shipment was rejected*. (*Who* rejected it? The buyer? Customs agents? A third-party carrier because of packaging issues? The seller's internal quality-control officer? Might the reader need to know?)

While the weaknesses of passive-voice phrasing may seem like esoteric niceties for overzealous legal-writing professors, don't be fooled. A computer search using the query "passive voice" yields more than 650 cases. And there is no shortage of court opinions showing how the passive voice can undermine real cases — sometimes fatally. For example, what if an attorney lapses into the passive voice while drafting important allegations in a complaint? Could that compromise the plaintiff's case? Here's one federal court's answer:

⁵⁸ *J & A Vending, Inc. v. J.A.M. Vending, Inc.*, 757 N.Y.S.2d 52, 55 (App. Div. 2d Dept. 2003).

S.E.C. v. PATEL

U.S. District Court, District of New Hampshire, 2009
2009 WL 3151143

STEVEN J. McAULIFF, Chief Judge.

. . .

The court also notes . . . that the amended complaint is no more helpful than the original complaint, and further observes that the SEC's presentation at the August 18 hearing (buttressed by its supplemental filing) suggest its own seeming inability to line up specific factual allegations with specific legal claims against specific defendants. Defendants find themselves, by and large, in the untenable position of not being able to determine what precise conduct each is said to have engaged in that allegedly gives rise to liability As the court observed at the hearing, the imprecision, passive voice, and circumlocutions employed throughout the amended complaint give the impression of drafters more intent on avoiding defamation liability than plainly and directly leveling factual allegations in support of legal claims.

. . .

As this is the first of several claims that are dismissed for failure to meet the Rule 9(b) pleading standard, it is worth noting that Rule 9(b) should not present an obstacle in this case, unless the SEC simply does not have the evidence necessary to state its claims against each defendant with some specificity. If the SEC has sufficient evidence supporting the individual claims made[,] . . . all Rule 9(b) requires is a modest degree of clarity — who did what, said what, to whom, and when? At this stage, inference, innuendo, resort to the passive voice, group pleading, and vague conclusory language all tend to suggest that the SEC does not have, and has little hope of finding, evidence necessary to support its claims.

. . .

The amended complaint alleges that Jaeger negotiated and finalized a deal with Everest while knowing that it lacked economic substance, but does not make any allegation that ties Jaeger to the accounting treatment of the revenue from that transaction. And, rather than alleging that Jaeger had a responsibility to disclose exchange rights to the finance department or outside auditor, but failed to do so, the SEC merely alleges, in the passive voice, that “exchange rights were not disclosed to Enterasys’s finance department or outside auditor” by some unnamed person or persons. Thus, while the SEC has alleged conduct by Jaeger that was not economically productive, it has not alleged conduct on his part that had the *purpose* and *effect* of creating a false appearance of fact.

Because the SEC has alleged no conduct on Jaeger’s part that had the purpose and effect of creating a false appearance of fact, the amended complaint does not state a claim against him under 15 U.S.C. § 77(q)(a)(1). Accordingly, Jaeger is entitled to dismissal of Count I. . . .

[The court next analyzes the allegations against defendant Skubisz.] What is notable about those paragraphs is what is not alleged. First, paragraph 237 alleges that the Wildflower side agreement “was not disclosed to the outside auditor,” but says nothing about whose responsibility it was to make such disclosures. One must presume that the SEC chose to use the passive voice for a reason. In addition, the lack of specificity concerning reporting responsibilities, either internal or external, deprives paragraph 238 of any adequately alleged facts regarding Skubisz’s knowledge of the falsity of the statements in his management representation letter.

In sum, the SEC has failed to state a claim against Skubisz under Rule 13b2-2.

Notes & Questions

1. *Patel* was no aberration. Consider *Wiebel v. Morris, Downing & Sherred*, where the plaintiff's complaint contained this allegation: "As a result of their ongoing relationship and the improper legal representation of Paul Wiebel by Defendant Johnson and Defendant Law Firm, Flaherty was manipulated to agree to certain provisions in the pre-nuptial agreement which were contrary to her interests and rights."⁵⁹ The court held that the plaintiff failed to state a viable claim because this allegation did not identify *who* manipulated Flaherty into accepting the disputed provisions:

The use of the passive voice here ("Flaherty was manipulated") obscures the absence of a theory of causation. The Complaint does not allege that Defendants manipulated Flaherty and caused her to agree to certain provisions in the pre-nuptial agreement. Neither of these fragments lays out a plausible theory of Defendants causing Plaintiff damage.⁶⁰

Similarly, in *Coroles v. Sabey*, a group of disgruntled investors alleged that they "were falsely told" that sports celebrities were substantial investors in a business venture.⁶¹ The court observed that this allegation was stated in "the passive voice . . . , failing to identify exactly who made the alleged misrepresentations."⁶² Because of this and other flaws, the court affirmed dismissal of the investors' fraud claim, concluding that they had failed to plead it with sufficient particularity.

⁵⁹ 2009 WL 81344 at *4 (D.N.J. Jan. 12, 2009).

⁶⁰ *Id.*

⁶¹ 79 P.3d 974, 981 (Utah App. 2003).

⁶² *Id.*

Yet another court found fatal deficiencies in a RICO complaint's mail- and wire-fraud allegations, which stated that a disputed infomercial "was transmitted by electronic means."⁶³ The court noted that this allegation was "stated in the passive voice" and that "[n]o particular defendant [was] said to have committed this alleged crime."⁶⁴ The plaintiffs' failure to explicitly attribute wrongful acts to certain defendants "doom[ed] the complaint as to those defendants."⁶⁵

2. Legislators have also given courts fits by using the passive voice and failing to identify explicit actors. The United States Supreme Court has observed that "[w]hen Congress writes a statute in the passive voice, it often fails to indicate who must take a required action. This silence can make the meaning of a statute somewhat difficult to ascertain."⁶⁶ State legislators, too, have forced courts to engage in time-consuming and imprecise statutory construction that the drafters could have avoided had they written in the active voice and identified the actor.

For example, in *DaimlerChrysler Services N.A., LLC v. State Tax Assessor*, the court noted that "[w]hen a statute is drafted in the passive voice, it can be difficult to determine whom the Legislature intended as the actor."⁶⁷ Likewise, the court in *Arlington Education Assn. v. Arlington School District No. 3* observed that the text of Oregon's judicial-notice statute "suggests that *someone* must be unable to reasonably question the accuracy of the sources," but

⁶³ *Zito v. Leasecomm Corp.*, 2003 WL 22251352 at *10 (S.D.N.Y. Sept. 30, 2003).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *U.S. v. Wilson*, 503 U.S. 329, 334–35 (1992).

⁶⁷ 817 A.2d 862, 865 (Me. 2003).

“because the statute is written in the passive voice, it does not specify who that someone is.”⁶⁸

3. Passive-voice writing has undermined everything from criminal prosecutions to parental-termination cases. For instance, the Seventh Circuit questioned the sufficiency of evidence supporting a prisoner’s conviction for possessing a sharpened weapon because the prison guard’s report was “written largely in passive voice and never identifie[d] which inmates either received the razors or returned the razors without blades.”⁶⁹ Likewise, a juvenile court’s written findings of fact were not an adequate basis for terminating parental rights because “the juvenile court’s use of the passive voice obscure[d] its conclusion regarding the identity of the abuser or abusers.”⁷⁰

4. In his autobiography, *On Writing: A Memoir of the Craft*, the popular fiction writer Stephen King said that the passive voice is one of his two pet peeves concerning the “most basic level of writing.”⁷¹ (The other is adverb overuse.) King’s criticism of passive-voice phrasing sounds remarkably similar to the criticism seen in the court opinions cited above: “Two pages of the passive voice — just about any business document ever written, in other words, not to mention reams of bad fiction — make me want to scream. It’s weak, it’s circuitous, and it’s frequently tortuous, as well.”⁷²

⁶⁸ 34 P.3d 1197, 1200 (Or. App. 2001).

⁶⁹ *Castro v. Hastings*, 74 Fed. Appx. 607, 609 (7th Cir. 2003) (unpublished).

⁷⁰ *In re MJB*, 140 S.W.3d 643, 656 (Tenn. App. 2004).

⁷¹ Stephen King, *On Writing: A Memoir of the Craft* 115 (Pocket Books 2000).

⁷² *Id.* at 117.

Word Choice (Semantic Ambiguity)

Semantic ambiguity arises when words “are capable of multiple, inconsistent meanings.”⁷³ Although context can often resolve the ambiguity,⁷⁴ legal drafters should strive to make detective work unnecessary.

Some stilted legalese standbys, which lawyers often use in rote fashion under a false sense of precision, have made the courts’ list of semantic-ambiguity offenders: *thereof*,⁷⁵ *said* (when used as a modifier),⁷⁶ *executed*,⁷⁷ *deemed executed*,⁷⁸ *terminate*,⁷⁹ and *the foregoing*,⁸⁰ to name a few. But even ordinary words like *any*,⁸¹ *when*,⁸² *work*,⁸³ and *enter*⁸⁴ can be ambiguous, depending on the circumstances. A legal writer’s quest for clarity is not an easy one.

⁷³ *Dombrowski v. Swiftships, Inc.*, 864 F. Supp. 1242, 1247 (S.D. Fla. 1994).

⁷⁴ *100 Ctr. Dev. Co. v. Hacienda Mexican Rest., Inc.*, 546 N.E.2d 1256, 1258 n. 1 (Ind. App. 1989).

⁷⁵ See, e.g., *Trustees of First Union Real Est. Eq. & Mortg. Invs. v. Mandell*, 1991 WL 494526 at *4–5 (S.D. Ind. Nov. 21, 1991), *aff’d*, 987 F.2d 1286 (7th Cir. 1993).

⁷⁶ See, e.g., *Hanifin v. C & R Constr. Co.*, 48 N.E.2d 913, 916 (Mass. 1943).

⁷⁷ See, e.g., *Allen v. Wilson Co. Investors, LLC*, 2003 WL 21849545 at *10 (Tenn. App. Aug. 8, 2003).

⁷⁸ See, e.g., *In re Johnson*, 371 B.R. 336, 343 (C.D. Ill. 2007).

⁷⁹ See, e.g., *Nekoosa Papers, Inc. v. Magnum Timber Corp.*, 632 N.W.2d 124 (table), 2001 WL 694722 at *3 (Wis. App. June 21, 2001).

⁸⁰ See, e.g., *State v. Nieto*, 79 P.3d 473, 476 (Wash. App. 2003).

⁸¹ See, e.g., *U.S. v. Tann*, 577 F.3d 533, 537 (3d Cir. 2009).

⁸² See, e.g., *Sulayao v. Shanahan*, 2009 WL 3003188 at *4 (S.D.N.Y. Sept. 15, 2009).

⁸³ See, e.g., *Hartford Underwriters Ins. Co. v. Phoebus*, 979 A.2d 299, 310 (Md. App. 2009), *aff’d sub nom. John L. Mattingly Constr. Co. v. Hartford Underwriters Ins. Co.*, 999 A.2d 1066, 1075 (Md. 2010) (also noting contextual ambiguity from the word’s inconsistent use).

⁸⁴ See, e.g., *In re Risk Level Determination of G.G.*, 771 N.W.2d 64, 67 (Minn. App. 2009).

In the next case, the court had to decide what the word *due* means. The word appeared in a contract’s limitation-of-damages provision, and the contracting parties hotly disputed its meaning. More than a million dollars hung in the balance:

**AWARE, INC. v. CENTILLIUM
COMMUNICATIONS, INC.**

U.S. District Court, District of Massachusetts, 2009
604 F. Supp. 2d 306

GORTON, District Judge.

This is a breach of contract action arising out of a product development and license agreement. The defendant has moved to dismiss a number of the plaintiff’s claims on the ground that the subject contract expressly limits the liability of the parties in a way that precludes most of plaintiff’s claims. . . .

I. Background

. . . .

The dispute between Aware and Centillium arises out of a Development and License Agreement (“the Agreement”) Under the Agreement, Aware licensed its proprietary DSL technology to Centillium and agreed to work jointly with Centillium to develop a set of “Centillium Products” incorporating Aware’s technology.

. . . .

Article 12.2 of the Agreement imposes limitations on each party’s liability under the contract. That portion of the Agreement states . . . :

. . . IN NO EVENT SHALL THE LIABILITY OF . . .
[CENTILLIUM] EXCEED THE AMOUNTS PAID AND DUE
TO AWARE UNDER THIS AGREEMENT. . . .

II. *Motion for Partial Dismissal*

1. Effect of Article 12.2 of the Agreement on Plaintiff's Claims

... Neither party disputes that Article 12.2 limits Centillium's liability to "amounts paid and due under [the] Agreement." They disagree, however, about what that provision means.

Centillium asserts that amounts "due" means amounts currently owing and payable to Aware. At the time of the alleged breach, Centillium had made all required payments under the milestone schedule and, therefore, nothing was presently "due" to Aware. The remaining fees and royalty payments were to become due only upon Aware's completion of the Second Centillium CO Product and the sale of products by Centillium. According to Centillium, Article 12.2 served as the functional equivalent of a termination-at-will clause.

Aware responds that Article 12.2 does not limit Centillium's liability to the degree that [Centillium] suggests. Rather, according to Aware, that provision limits Centillium's liability to the amounts that were to become due under the contract (i.e., expectation damages). Under such an interpretation Aware asserts that it is entitled to recover the remaining \$1,237,500 in milestone fees as well as royalty payments that it expected to receive pursuant to the Agreement.

Recognizing that the meaning of the word "due" is crucial to this Court's analysis, both parties cite dictionary definitions that support their respective interpretations of that loaded word. *Compare* Black's Law Dictionary 538 (8th ed. 2004) (defining "due" as "[i]mmediately enforceable" or "[o]wing or payable; constituting a debt"), *with BloomSouth Flooring Corp. v. Boys' and Girls' Club of Taunton Inc.*, 440 Mass. 618, 623 n. 10, 800 N.E.2d 1038 ("The

word ‘due’ always imports a fixed and settled obligation or liability, but with reference to the time for its payment there is considerable ambiguity in the use of the term, the precise significance being determined in each case from the context” (citing Black’s Law Dictionary 499 (6th ed. 1990)); *see also* The American Heritage College Dictionary 424 (3d ed. 1997) (defining due as “[e]xpecting or ready for something as part of a normal course or sequence”). The conflicting dictionary definitions suggest an ambiguity in the Agreement and language elsewhere confirms that [Aware’s] proposed interpretation is at least plausible. . . .

. . .

Consequently, this Court concludes that, at the very least, Article 12.2 is ambiguous and therefore does not compel the dismissal of plaintiff’s claims. . . .

. . .

In accordance with the foregoing, Centillum’s partial motion (sic) to dismiss . . . [is] DENIED.

Notes & Questions

1. How could the limitation-of-damages provision be redrafted to clearly support Centillum’s interpretation? Aware’s interpretation?

2. A vivid semantic-ambiguity issue arose in *100 Center Development Co. v. Hacienda Mexican Restaurant, Inc.*, where a commercial lease required a shopping center to get its restaurant tenant’s written consent before reducing the “present parking area.”⁸⁵ Without getting the restaurant’s consent, the shopping center made

⁸⁵ 546 N.E.2d 1256, 1257 (Ind. App. 1989).

plans to construct a new building — with some new parking spaces — in the existing parking lot.

The restaurant sued to stop the project. It argued that the phrase “‘present parking area’ refer[red] to the geographical location of the parking area at the time the lease was entered into,” and it was undisputed that the construction project would reduce that area.⁸⁶ The shopping center countered that “‘present parking area’ refer[red] to the number of parking spaces available for use by [the restaurant’s] customers at the time the lease was signed.”⁸⁷ It argued that there was no reduction in the “present parking area” because newly added parking spaces would “produce a net gain in parking space available to [the restaurant’s] customers.”⁸⁸

The court noted that this dispute “involve[d] a ‘semantic ambiguity’” because the phrase “‘present parking area’ seem[ed] subject to two reasonable interpretations, one involving geography, the other geometry.”⁸⁹ But by giving the words their “usual meanings” and by “harmonizing” the disputed phrase with other lease provisions, the court found that the disputed phrase supported the restaurant’s reading because the new building “would eliminate part of the parking lot.”⁹⁰ The court added that it would have construed any ambiguity against the shopping center as the drafter of the lease.

⁸⁶ *Id.* at 1258.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1258 n. 1 & accompanying text.

⁹⁰ *Id.* at 1260.

Ambiguous Modifiers (Syntactic Ambiguity)

Ambiguous modifiers are among the writing glitches that can create syntactic ambiguity. Haphazard modifier placement can un-hinge even the shortest, simplest sentence: “We discussed running with Bob.”⁹¹ Did the writer (and someone else) speak to Bob about running? Or did the writer speak to someone else (but not Bob) about letting Bob come along on the next jog? As the D.C. Circuit observed after offering this example, the answer depends on “whether the prepositional phrase ‘with Bob’ modifies the verb ‘discussed’ or the gerund ‘running.’”⁹²

Courts and writers often speak of “misplaced” modifiers when facing this type of ambiguity. A misplaced modifier is “a phrase, clause, or word placed too far from the noun or pronoun it describes.”⁹³ When a misplaced modifier is present, the writer’s exact meaning gets clouded, which can “create confusion or imply something unintentionally funny.”⁹⁴ A Tenth Circuit judge used an old Groucho Marx joke to illustrate the potential for confusion — and humor: “One morning I shot an elephant in my pajamas. How he got into my pajamas I’ll never know.”⁹⁵ The joke reveals that “the most grammatical readings are not always the only reasonable ones.”⁹⁶ In short, misplaced modifiers spell trouble for lawyers trying to draft precise, unambiguous documents.

The case below involved what the court called “a classic example of the misplaced modifier.” Classic perhaps, but not

⁹¹ *U.S. v. Gaviria*, 116 F.3d 1498, 1510 (D.C. Cir. 1997).

⁹² *Id.*

⁹³ Laurie E. Rozakis, *The Complete Idiot’s Guide to Grammar & Style* 128 (2d ed., Alpha Books 1997).

⁹⁴ *Id.*

⁹⁵ *U.S. v. Hinckley*, 550 F.3d 926, 942 (10th Cir. 2008) (Gorsuch, J., concurring).

⁹⁶ *Id.*

straightforward. The question was whether the government was liable to pay for a leased helicopter that crashed during a U.S. Forest Service firefighting mission. The government’s liability depended on how the court interpreted the rental contract’s risk-of-loss clause, which placed the risk on the government if the loss occurred “[d]uring flights at elevations within less than 500 feet of the terrain for the purpose of observation or scouting, when directed by the Supervising Officer”

The critical facts were undisputed: the helicopter pilot was receiving instructions from a Forest Service supervisor (an aerial observer) when he crashed; the helicopter crashed during a flight below 500 feet; but the supervisor did not specifically instruct the helicopter pilot to fly below 500 feet.

The helicopter’s owner and lessor both argued that the phrase *when directed by the Supervising Officer* modified the plural noun *flights*. Thus, since a Forest Service supervisor directed the helicopter pilot during the ill-fated flight, the government bore the risk of loss. The government countered that the phrase *when directed by the Supervising Officer* modified the noun phrase *elevations of less than 500 feet of the terrain* — meaning that the government bore the risk of loss only if the supervisor specifically directed the helicopter pilot to fly below 500 feet. Here’s what the court thought:

S. W. AIRCRAFT, INC. v. UNITED STATES

United States Court of Claims, 1977

551 F.2d 1208

KUNZIG, Judge

. . . We come now to the basic issue of the case. What exactly does the following provision of the rental agreement mean?

LOSS, DAMAGE, OR DESTRUCTION OF CONTRACTOR'S EQUIPMENT

Loss, damage, or destruction of the Contractor's equipment will be borne by the Contractor, except where caused solely by the negligent acts of Government employees or where the loss, damage, or destruction happens without fault of either the Government or the Contractor under the following conditions:

1. *During flights at elevations within less than 500 feet of the terrain for the purpose of observation or scouting, when directed by the Supervising Officer or by the Forest Officer making the flight.* (emphasis supplied)

[The Government] would have us say that the Government assumes the risk only when the helicopter is specifically directed below 500 feet. [The helicopter's lessor, Western Helicopter Services, Inc., and its owner, S.W. Aircraft, Inc.], of course, argue that the Government bears the responsibility whenever an accident occurs when the helicopter is flying below 500 feet, even absent specific altitude instructions, if the flight itself is Government-directed.

The parties stipulate that:

“At the time the helicopter crashed, it was being directed to the site of the fire by Mr. Ty Wood, a United States Forest Service aerial observer (who was a summer employee), but the helicopter was not instructed to fly at any specific altitude.”

The question, therefore, is whether Mr. Wood's directions are sufficient under the contract to make the Government liable.

We think they are. Ordinarily in interpreting a contract or statute, we look to the plain meaning of the provision in question. . . . But in the instant case, the words are susceptible of two meanings.

What remains is a problem of draftsmanship — a classic example of the misplaced modifier. In such a case, we are influenced greatly by the fact that the Government drafted the contract. It had the opportunity to make the provision clear, but it did not. Applying the rule of *contra proferentem*, [footnote omitted] we hold that the clause should be construed against the drafter, the Government.

Under this interpretation, it is clear that the contractual provision does not require that the pilot be specifically instructed to fly at less than 500 feet in altitude. It only requires that, for the Government to be liable, the helicopter be flying at under 500 feet and following the instructions of defendant's aerial observer.

That is exactly what occurred in this case. . . . The Government, therefore, must bear the cost of the destruction of the helicopter.

Notes & Questions

1. If the helicopter owner or lessor had drafted the rental contract instead of the government, might the court have decided the case differently? How could the disputed provision in *S.W. Aircraft* be rewritten to clearly support the government's position?

2. In *State v. Mallett*,⁹⁷ the court faced a “squinting” modifier — meaning a modifier that could be read to modify either the words preceding it or the words following it. An Iowa statute stated that a person commits identity theft “if the person with the intent to obtain a benefit fraudulently obtains identification information of another person”⁹⁸ The defendant argued that the word *fraudulently* modified the phrase that followed it (*obtains identification information*) rather than the phrase that preceded it (*to obtain a benefit*). The court — and the parties — agreed that the

⁹⁷ 2003 WL 22901008 (Iowa App. Dec. 10, 2003).

⁹⁸ *Id.* at *1 (quoting Iowa Code § 715A.8).

squinting modifier created ambiguity.⁹⁹ Thus, the court was forced to review legislative history, which supported the prosecutor's interpretation.

3. Modifiers before or after a series are especially prone to causing ambiguity.¹⁰⁰ For example, a trailing modifier raised questions in *U.S. v. Gaviria*,¹⁰¹ where the D.C. Circuit found ambiguity in a jury instruction on conspiracy. The instruction stated that the prosecutor need not “prove that a particular defendant was aware of the common purpose, had knowledge that the conspiracy existed, or was aware of the conspiracy from its beginning.”¹⁰²

The defendant argued that the phrase *from its beginning* could be read to modify “only the last of the three verb phrases in the sentence (‘was aware of the conspiracy’).”¹⁰³ If read this way, the court noted, “the sentence would imply that the Government need not prove that a particular defendant was (ever) aware of the common purpose of the conspiracy” or “that a particular defendant (ever) had knowledge that the conspiracy existed.”¹⁰⁴ The prosecutor agreed that this “would not be a correct statement of the law.”¹⁰⁵

The prosecutor argued that the phrase *from its beginning* modified all three verb phrases, thus accurately reflecting the law.¹⁰⁶ After acknowledging the syntactic ambiguity, the court threw a life preserver to the prosecutor (and the instruction's drafters), finding

⁹⁹ *Id.* at *2.

¹⁰⁰ See Jeffrey S. Ammon, *Ambiguous Drafting and the 12-Pound Cat*, 12 Mich. B.J. 56 (July 2011).

¹⁰¹ 116 F.3d 1498 (D.C. Cir. 1997).

¹⁰² *Id.* at 1509.

¹⁰³ *Id.* at 1510.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

that other instructions were clear enough to cure any confusion caused by the disputed instruction's ambiguous trailing modifier.

Personal Attacks

In journal article after journal article, judges have advised lawyers to free their briefs of personal attacks on opposing counsel, opposing parties, and lower-court judges. Consider, for example, this appellate judge's observations:

Name-calling of opposing parties or counsel or of the trial judge brings most reviewing judges to an instant boil. Not only are such attacks unprofessional and guaranteed to irritate, but they simply cloud the merits of any argument. It is not effective advocacy to accuse an opponent of "fraudulently misrepresenting the law" or of making legal arguments that are "idiotic" or "sheer lunacy," terms that show up in briefs from time to time. If an opponent's argument lacks substance, this should be demonstrated through deadly logic, not vilification.¹⁰⁷

Judges sing the same tune in their case opinions. Although the parties' mutual animus may tempt their attorneys to act in kind, "attorneys are professionals and must resist that tendency."¹⁰⁸ "Effective advocacy does not require, indeed can be adversely affected by, personal attacks upon one's adversary"¹⁰⁹ "Shrill accusations of impropriety by opposing counsel are rarely constructive; rather, they often serve to obfuscate the issues, muddy the waters,

¹⁰⁷ Robert J. Kapelke, *Some Random Thoughts on Brief Writing*, 32 *Colo. Law.* 29, 29–30 (Jan. 2003).

¹⁰⁸ *Topp's Co. v. Cadbury Stani S.A.I.C.*, 2005 WL 2464963 at *4 (S.D.N.Y. Oct. 6, 2005).

¹⁰⁹ *Id.*

and shift the focus away from the task at hand.”¹¹⁰ Indeed, “[s]uch ‘scorched-earth’ tactics, when coupled — as they almost invariably are — with lurid and misleadingly incomplete descriptions of the record[,] are counterproductive.”¹¹¹ It’s a fitting irony that personal attacks usually end up lowering the court’s opinion of the lawyer *making* them rather than his or her target.¹¹² The attacks erode the attacker’s credibility.¹¹³

Lawyers who litter their motions, briefs, or pleadings with personal attacks may face a variety of consequences. At best (for offending advocates, that is), courts may simply ignore the attacks.¹¹⁴ Or courts may take more affirmative steps, like striking offensive documents in whole or in part¹¹⁵ or admonishing lawyers to avoid future attacks.¹¹⁶ Courts may also sanction attorneys.¹¹⁷ One creative judge who’d had his fill of personal attacks warned the offending attorneys that future attacks would be “sanctioned at \$50 per word.”¹¹⁸

¹¹⁰ *Carstarphen v. Deutsche Bank Nat’l Trust Co.*, 2009 WL 1537861 at *3 n. 8 (S.D. Ala. June 1, 2009).

¹¹¹ *Tabvili v. Wash. Mut. Bank*, 197 P.3d 541, 547 (Or. App. 2008).

¹¹² See, e.g., *In re Cygnus Telecomm. Tech., LLC, Patent Litig.*, 536 F.3d 1343, 1360 (Fed. Cir. 2008) (“Typically, however, such attacks do more harm than good to the party that launches them.”).

¹¹³ *Meyler v. Comm’r of Soc. Sec.*, 238 Fed. Appx. 884, 888 n. 2 (3d Cir. 2007) (unpublished).

¹¹⁴ See, e.g., *Siemens Transp. Partn. Puerto Rico, S.E. v. Redondo Perini Jt. Venture*, 2006 WL 2660707 at *6 (N.Y. Sup. Ct. Sept. 15, 2006).

¹¹⁵ See, e.g., *Allen v. Ghoulis Gallery*, 2008 WL 474394 at *2 (S.D. Cal. Feb. 19, 2008) (striking portions of pleading); *Meyler*, 238 Fed. Appx. at 888 n. 2 (striking entire appeal brief).

¹¹⁶ See, e.g., *Great Wall Acupuncture, P.C. v. Gen. Assurance Co.*, 871 N.Y.S.2d 582, 584 (App. Term 2008); *Carstarphen*, 2009 WL 1537861 at *3 n. 8.

¹¹⁷ *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1308 (11th Cir. 2002).

¹¹⁸ *Wall v. Leavitt*, 2007 WL 4219162 at *1 (E.D. Cal. Nov. 29, 2007).

In the following case, an attorney who ignored repeated warnings to avoid personal attacks in his appellate briefs ended up facing more than a lost appeal:

CRUZ v. COMMISSIONER OF SOCIAL SECURITY

United States Court of Appeals, Third Circuit, 2007

244 Fed. Appx. 475

JORDAN, Circuit Judge.

Jose Cruz appeals from an order of the United States District Court for the District of New Jersey affirming the decision of an Administrative Law Judge (ALJ) denying his claim for Supplemental Security Income and Disability Insurance Benefits.

. . .

Because the ALJ examined all of the evidence, made determinations as to the relative credibility of conflicting medical records, and properly supported those determinations by reference to the record, his ruling is supported by substantial evidence. Therefore, we affirm the decision of the District Court.

. . .

We are required to add a regrettable coda by noting that Cruz's attorney, Mr. Alter, made several unprofessional comments in his brief, going so far as to accuse the ALJ of misconduct. For example, in his discussion of the step-three analysis, he writes that the ALJ "intentionally fixed the analysis to avoid what he knows to be the appropriate listing," "finess[ed] step three," and "tortur[ed] the evidence to death." He also accuses the ALJ of "not be[ing] an objective decider of the facts," "hav[ing] an agenda," making "intentional errors," arriving at a "predictably goal-directed decision," and "wish[ing] diagnoses and restrictions away." Finally he calls the ALJ's decision a "disaster [that] must be sent back from whence

it came,” and demands that his client be “put out of his social security misery.” Heated rhetoric like this does nothing to advance a client’s cause. It serves only to distract attention from the merits and to call counsel’s judgment into question.

Were this counsel’s first offense, this might warrant nothing more than a footnote. But it is not. . . . His history of unprofessional conduct before us extends back to at least October 2000. In the brief he filed in *Frazier v. Commissioner of Social Security*, No. 00-1427, 242 F.3d 370 (3d Cir. Oct. 23, 2000), he hurled insults in a manner that has become his trademark. After calling the ALJ’s decision “entirely incompetent,” 2000 WL 34024365 at *8, he proceeded to discuss the ALJ’s “breathtaking ignorance,” *id.* at *11, the ALJ’s “ridiculous assumption,” *id.* at *13, and the ALJ’s attempted “evidence nullification,” *id.* at *16, and “quackery,” *id.* at *17 n. 1. He summed up by concluding that the ALJ’s “analysis is one-third invention, one-third ignorance and one-third inspiration.” *Id.* at *18. . . .

. . . .

This year, Mr. Alter has accelerated the pace of his unprofessional outbursts. . . . The brief he filed in *Meyler v. Commissioner of Social Security* was struck for violating Local Appellate Rule 28.1(c), which requires “counsel to exercise appropriate professional behavior in all briefs and to refrain from making ad hominem attacks on opposing counsel or parties.” *See* Docket for *Meyler*, No. 06-4280 (3d Cir. June 22, 2007). The order striking the brief criticized his work for being “rife with ad hominem attacks,” and employing “language that we deem offensive and for which there can be no justification or excuse.” *Id.* We further warned that “any such similar conduct [in the future] will result in the issuance of an Order to Show Cause as to why [Alter] should not be sanctioned under Rules 11(b) and (c) of the Federal Rules of Civil Procedure.” *Id.* . . .

These reprimands, spanning a period of seven years, indicate a serious pattern of unprofessional and offensive behavior. . . . Viewing this steady stream of invective, and at the risk of some heat in our own language, we have concluded that the court can no longer tolerate the pollution of appellate practice that these repeated ad hominem attacks represent. Consequently, we refer Mr. Alter to the Court's Standing Committee on Attorney Discipline so that the Committee may make a recommendation to the Court as to whether Mr. Alter should be disciplined for his repeated violations of Local Rule 28.1(c), his consistent disregard of the many reprimands he has received for those violations, and for conduct unbecoming a member of the bar of this court. See Rule 4.2, Third Circuit Rules of Attorney Disciplinary Enforcement.

Notes & Questions

1. The Third Circuit's Standing Committee on Attorney Discipline later recommended that the court publicly reprimand Cruz's attorney. The court adopted that recommendation, publicly reprimanding the attorney "for his intemperate and inflammatory language in his briefs filed in this Court."¹¹⁹ The court opted against a more severe penalty — suspension — because of mitigating factors. And the attorney "took full responsibility for his actions and did not attempt to justify them."¹²⁰

2. Although courts speak of their inherent power to address personal attacks, court rules may also empower courts to act. For instance, Fed. R. Civ. P. 12(f) provides that federal courts may, on their own initiative or on motion, "strike from a pleading . . . any . . . immaterial, impertinent, or scandalous matter." A federal judge

¹¹⁹ *In re Alter*, 264 Fed. Appx. 195, 196 (3d Cir. 2008) (unpublished).

¹²⁰ *Id.*

invoked this rule in *Wade v. Smith*, stating that a complaint “riddled with *ad hominem* attacks” could be struck under Rule 12(f).¹²¹

3. Most cases on this topic involve lawyers’ personal attacks on opposing counsel, opposing parties, or judicial officers. But courts seem equally annoyed by personal attacks on adverse witnesses. For example, in *Benedetto v. Commissioner of Social Security*, the Third Circuit expressed its “displeasure” with an appellate attorney whose brief included “repeated *ad hominem* attacks” on an adverse medical witness.¹²²

4. Can attorneys be zealous advocates without resorting to personal attacks and inflammatory language? How? What writing techniques make legal arguments forceful and credible without personal attacks?

5. You’ll find an informative discussion on writing with civility in chapter 10 of Judith D. Fischer’s *Pleasing the Court: Writing Ethical and Effective Briefs* (2d ed., Carolina Academic Press 2011).

Grammar & Punctuation

Although the finer points of grammar and punctuation are not the stuff of movie courtroom dramas, they are common points of discussion — and urgent debate — in the courtroom. A Westlaw or Lexis query reveals that nearly 150 United States Supreme Court opinions refer explicitly to “grammar” or “punctuation.” In construing codified laws, the Court has looked to the presence, absence,

¹²¹ 1991 WL 504873 at *2 (S.D. Ind. May 30, 1991).

¹²² 2007 WL 4395648 at *2 n. 2 (3d Cir. Dec. 14, 2007).

or position of commas,¹²³ colons,¹²⁴ semicolons,¹²⁵ hyphens,¹²⁶ and dashes.¹²⁷ The Court's opinions also refer to independent clauses,¹²⁸ dependent clauses,¹²⁹ prepositions,¹³⁰ conjunctions,¹³¹ and the like.

The lower federal courts likewise recognize that when interpreting a statute, “[t]he grammatical structure of the statute, including language and punctuation, is critical to determine its meaning.”¹³² State courts echo this sentiment: “Punctuation is an important factor in determining legislative intent, and the Legislature is presumed to know the rules of grammar.”¹³³ State and federal courts have also examined grammar and punctuation while interpreting contracts.¹³⁴

Lawyers and law students who ignore or scoff at legal-writing manuals should know that courts do not ignore or scoff at them. Far from it. Courts have cited popular texts like Bryan Garner's

¹²³ See, e.g., *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989); *Miller v. Stand. Nut Margarine Co. of Fla.*, 284 U.S. 498, 508 (1932).

¹²⁴ See, e.g., *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993).

¹²⁵ See, e.g., *U.S. v. Hayes*, 555 U.S. 415, 423, 424 (2009); *Cheney v. Van Arsdale*, 82 U.S. 68, 70 (1872).

¹²⁶ See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 220 n. 6 (2009).

¹²⁷ See, e.g., *Castillo v. U.S.*, 530 U.S. 120, 124–25 (2000).

¹²⁸ See, e.g., *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994).

¹²⁹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

¹³⁰ See, e.g., *Dist. of Columbia v. Heller*, 554 U.S. 570, 586 (2008).

¹³¹ See, e.g., *Lamie v. U.S. Trustee*, 540 U.S. 526, 533–35 (2004); *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 102 (1989).

¹³² *In re Armstrong*, 395 B.R. 127, 129 (E.D. Wash. 2008).

¹³³ *People v. Beardley*, 688 N.W.2d 304, 306 (Mich. App. 2004).

¹³⁴ See, e.g., *Favell v. U.S.*, 16 Cl. Ct. 700, 722 (1989); *Davis v. Pletcher*, 727 S.W.2d 29, 33 (Tex. App. 1987).

*The Redbook: A Manual on Legal Style*¹³⁵ and Richard Wydick's *Plain English for Lawyers*¹³⁶ for guidance in unscrambling questions of grammar, punctuation, and usage.

Legal drafters, especially, should follow the courts' lead in paying close attention to grammar and punctuation. Thousands of dollars — or much more — may rest on something as mundane as a comma.

Consider the insurance company that omitted a comma from an important policy exclusion. Could something as seemingly minor as a single missing comma really make a difference? The case involved policyholders who often hosted their grandchild for weekend visits. During one visit, the grandchild was injured while a policyholder was supervising him. The insurer denied liability coverage based on a policy exclusion that eliminated coverage for injuries to “‘you’, and if residents of ‘your’ household, ‘your’ relatives and persons in ‘your’ care.”

The insurer argued that this exclusion applied — thus barring coverage — because the grandchild was injured while in the policyholders' care. The policyholders countered that the exclusion foreclosed coverage only if the injured relative was, in addition to being in their care, a *resident* of their household when injured. The court's decision hinged on one comma:

¹³⁵ See, e.g., *In re Ocwen Loan Servicing, LLC, Mortg. Servicing Litig.*, 491 F.3d 638, 646 (7th Cir. 2007).

¹³⁶ See, e.g., *U.S. v. Wallace*, 476 F. Supp. 2d 1129, 1134 (D. Ariz. 2007).

**INDIANA FARMERS MUTUAL
INSURANCE CO. v. IMEL**
Indiana Court of Appeals, 2004
817 N.E.2d 299

RILEY, Judge.

... A.T., [a minor,] was visiting the Imels, [his paternal grandparents,] for the weekend. That day, Imel, accompanied by A.T., walked over to the barn where Imel planned to move a cow At that time, Imel was supervising A.T. While attempting to load the cow into the trailer, the cow behaved unexpectedly, running towards the corner of the barn where Imel had instructed A.T. to wait. The cow ran over A.T., resulting in bodily injury.

At the time of the accident, Imel carried an insurance policy with Indiana Farmers, which provided liability and medical payment coverage. . . .

DISCUSSION AND DECISION

. . . .

II. *Liability Coverage*

A. *Exclusion Language*

Indiana Farmers contend that the trial court erred in granting summary judgment to Imel and Smith. In particular, the insurance company alleges that . . . the policy's exclusion of liability provision clearly does not require A.T. to be a resident of the Imel household. Rather, they claim it to be sufficient for A.T. to be in Imel's care in order for Indiana Farmers to deny coverage under the liability section of the policy.

... [T]he policy language at issue reads as follows:

2. Additional Exclusions That Apply Only to Coverage L — Coverage L does not apply to:

a. “bodily injury” to “you”, and if residents of “your” household, “your” relatives and persons in “your” care

. . . .

. . . [I]n support of their respective arguments, [the parties] direct us to the same three cases of foreign jurisdiction. The common denominator of these referenced cases with the instant case is the close similarity in the insurance policy’s language. The liability exclusion provision in the foreign jurisdiction cases reads as: liability coverage does not apply to “bodily injury to you, *and if residents of your household, your relatives, and persons under the age of 21 in your care*” (emphasis added).

Interpreting this exclusion, the Minnesota supreme court in *Reinsurance Association of Minnesota v. Hanks*, 539 N.W.2d 793 (Minn.1995), noted that the third comma in the exclusion clearly separates the word “relatives” from the words “any other person under 21 in your care . . .” *Id.* at 796. If persons under 21 in the care of the insured were required to be residents of the insured’s household to be excluded, the comma would be unnecessary. *Id.* In its analysis, the supreme court relied on *Utica Fire Ins. Co. of Oneida County v. Gozdziaik*, 198 A.D.2d 775, 604 N.Y.S.2d 371 (N.Y.App.Div.1993).

In *Gozdziaik*, . . . [the] court concluded that “[t]he exclusion sets forth three distinct classes of individuals, injury to whom is not covered: the policyholder; the policyholder’s resident relatives; and minors in the care of the policyholder or his resident relatives, *irrespective of the minors’ residence.*” *Id.* (emphasis in original). The court found that the final comma after the word “relatives” would be unnecessary if the phrase “if residents of your household” was intended to modify the words “persons under 21 years of age.” *Id.* at 372.

[The court then discussed a third case reaching the same result, *Horace Mann Ins. v. Stark*, 987 F. Supp. 562 (W.D. Mich. 1997).]

However, in the case at hand, the exclusion language is distinguishable from these cases in that no punctuation follows the phrase “your relatives.” Rather, only the phrase “and if residents of your household” is offset by commas, with the remainder of the provision lacking all punctuation. Although Indiana Farmers readily concedes the grammatical difference in policy language, it nonetheless encourages us to close our eyes to the missing comma and follow the precedent constructed in *Hanks*, *Gozdziak*, and *Stark*. We decline this invitation.

While each court in *Hanks*, *Gozdziak*, and *Stark* found the inclusion of the third comma, after the words “your relatives,” to be central to the clarification of the exclusionary provision, we, on the other hand, find the explicit absence of the third comma to be pivotal to the interpretation of the provision at issue. The courts in each of the three referenced cases noted that if the residency requirement were intended to apply to all of the categories of excluded people, as opposed to relatives only, then the third comma would not be necessary. We agree with Smith’s argument that, as the exclusionary provision of the policy here does not contain the third comma following the words “your relatives,” the reasonable interpretation is that the residency requirement modifies all three categories of individuals, *i.e.*, relatives, persons in the policyholder’s care, and persons in the care of the policyholder’s resident relatives. Thus, based on the punctuation applied by Indiana Farmers, we conclude that the exclusionary provision’s structure requires A.T. to be a resident of the Imel household in order for Indiana Farmers to deny liability coverage.

... Viewing all the evidence before us, we find that A.T. is not a resident of Imel’s household, even though he was in Imel’s care at

the time of the accident. Accordingly, A.T.'s bodily injuries are not excluded from coverage under the liability provisions of Indiana Farmers' policy. . . .

Affirmed.

Notes & Questions

1. Of course, good drafting can prevent having the meaning or interpretation hang on a comma. Ideally, punctuation only reinforces the intended meaning. Aside from comma placement, how could the provision in *Indiana Farmers* be redrafted to clearly support the company's position? How might a vertical list help?

2. In 2006, websites and e-mail inboxes were flooded with news of "the \$2.13 million comma." Rogers Communications Inc. and Aliant Inc. made a telecommunications contract that allowed Rogers to string its cable lines across thousands of Aliant's utility poles for \$9.60 per pole. Rogers believed that the contract — and this desirable per-pole price — was locked in for at least five years. Aliant said otherwise. Before the initial five-year term expired, Aliant announced that it was canceling the contract and nearly tripling its per-pole fee to \$28.05. Aliant claimed that the contract allowed it to cancel at any time. Rogers countered that the cancellation provision allowed Aliant to cancel only after the initial five-year term was finished.

An errant comma was Rogers's undoing. The disputed provision said that the contract "shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party." The second comma convinced the Canadian Radio-Television & Telecommunications Commission that the parties intended to set off the language captured within the two commas from the main clause — to treat the language within the commas as a subordinate element. Thus, the sentence could be —

and was — read to say that the contract “continues in force for a period of five years from the date it is made . . . unless and until terminated by one year prior notice in writing by either party.” So read, there was nothing to stop Aliant from canceling before the first five-year term elapsed (as long as it gave one year’s notice).¹³⁷

Rogers later convinced the Commission to reverse its decision, successfully arguing that a French version of the contract, which was worded a bit differently, should control.¹³⁸

Did the drafter of the controversial sentence in the English version try to cram too much vital information into a single sentence? Could the drafter have better expressed the different (yet closely related) ideas in multiple sentences? Would that have reduced the risk of misunderstandings and punctuation difficulties? If so, why?

3. Would businesses like Indiana Farmers Mutual Insurance Company and Rogers Communications benefit from using legal drafters with expertise in grammar and punctuation? Are those skills marketable for lawyers? Should they be?

4. A stray comma prompted the Federal Circuit to give different meanings to two nearly identical patent-correction statutes. The court saw a comma after the word *application* in one statute but observed that this comma was “conspicuously absent” from the other statute.¹³⁹ The court believed that the comma compelled a different interpretation of the statutes even though “the pertinent

¹³⁷ See Grant Robertson, *Comma Quirk Irks Rogers*, *Globe & Mail*, <http://www.theglobeandmail.com/report-on-business/comma-quirk-irks-rogers/article1101686> (Aug. 6, 2006).

¹³⁸ See Barbara Shecter, *Rogers Wins ‘Comma’ Contract Dispute*, *Nat’l Post*, <http://www.canada.com/nationalpost/financialpost/story.html?id=c19d4866-24ff-471f-81ec-fbdae30c05e2&k=75823> (Aug. 21, 2007).

¹³⁹ *Stark v. Advanced Magnetics, Inc.*, 119 F.3d 1551, 1555 (Fed. Cir. 1997).

legislative history suggests that sections 256 and 116 are to be interpreted in a uniform manner.¹⁴⁰

5. A federal judge in California minced no words after reading a brief fraught with grammatical (and other) errors:

It's not ideal to submit a brief where the first phrase of the text is a grammatical error using archaic language. (See, e.g., Opp'n to MortgageIT's Motion to Dismiss 1:20 ("COMES [sic] NOW Plaintiffs . . .").) It's worse, but still forgivable, to submit three briefs with the same mistake. Here, Plaintiffs' counsel has filed three briefs with mistakes far exceeding the minor oversights that inevitably manifest in a profession that requires considerable writing.

. . .

The submissions of Plaintiffs' counsel reveal disrespect for his clients, the Court, and Defendants. . . . In future submissions, Plaintiffs' counsel is cautioned to make subjects and verbs agree, use correct punctuation, cite to authorities or documents when quoting language, cite authorities and documents correctly, avoid run-on sentences, and avoid sentence fragments, particularly when the fragment is 11 lines long¹⁴¹

6. For more cases about grammar or punctuation, see Fischer, *Pleasing the Court* at 39–44.

Conclusion

Lawyers use the written word to create laws, to bring and defend claims, to argue about a law's meaning and application, and to help clients conduct business. So it should come as no surprise that a legal document's effectiveness depends, for better or for worse, on the writer's choice of words, phrasing, syntax, sentence length,

¹⁴⁰ *Id.*

¹⁴¹ *Marques v. MortgageIT, Inc.*, 2009 WL 4980269 at *1 (C.D. Cal. Dec. 14, 2009).

document length, tone, grammar, and punctuation. Cases from across the country show that a legal writer's style choices matter — a lot. When it comes to legal writing, style is substance.