

“Any and All”: To Use Or Not To Use?

By David S. Elder

I was given a rough time recently by two friends about what they described as “the pompous verbiage that lawyers use for language.” One of them said, “I suppose you lawyers refer to Dana’s classic as *Two Years Prior to the Mast*.” The other added, “And you probably call that popular poem of Kipling’s ‘In the Event That.’” Was there any answer I could make?

—Williard, 49 ABA J 934 (1963)

Perhaps this simple anecdote says it all. But does it really?

Lawyers, for as many years as there have been lawyers, have debated the use of plain language in their speech and written work. Is the use of “legalese” and redundant phrases a self-protecting language that lawyers use to insulate themselves from the rest of society? Do lawyers use phrases such as “hereby” and “party of the first part” simply because these terms have become reflexive Pavlovian legal language?

And most important, when may fine distinctions in meaning influence the outcome of a case? Certainly one of the greatest fears that a lawyer faces is the possibility of an adverse judgment because of misusing a word or phrase.

“Plain Language” is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

So what about “any and all”? Is it really necessary, or can it be discarded as archaic and redundant? Death by purposeful neglect or continued existence by legal need, that is the question.

Webster’s Ninth New Collegiate Dictionary (Merriam-Webster, 1984), p 93, gives the following as one definition of the word “any”: “2: one, some, or all indiscriminately of whatever quantity: a: one or more—used to indicate an undetermined number or amount.”

And the reverse is also true. One definition of “all” is “any whatever.” *Id.*, p 71. In other words, “any” is broad enough to include “all,” and “all” can mean any one.

Even more convincing is *Black’s Law Dictionary* (6th ed), p 94, which defines “any” as follows:

“Some, one out of many; an indefinite number. One indiscriminately of whatever kind of quantity . . . [A]ny’ has a diversity of meaning and may be employed to indicate ‘all’ or ‘every’ as well as ‘some’ or ‘one’ and its meaning in a given statute depends upon the context and the subject matter of the statute. It is often synonymous with ‘either,’ ‘every,’ or ‘all.’” (Citations omitted; emphasis added.)

Authorities on legal writing have urged writers to avoid using “any and all.” Bryan Garner’s *Elements of Legal Style* (Oxford University Press, 1991), pp 187-188, convincingly recommends:

“7.10. Instead of Using Doublets or Triplets, Use a Single Word.

Among the lawyer’s least endearing habits is to string out near-synonyms. The causes are several. First, the language of the law has its origins in the unhurried prose of centuries past. Second, the strong oral tradition in England led inevitably to a surfeit of words

to allow time for the listener to take in the speaker’s point. Third, where one of the words might be unfamiliar, the synonym served as a gloss. Finally, lawyers distrusted their ability to find the right word, and therefore used a verbal scattergun instead of a rifle shot. As a result, we still use phrases such as these:

agree and covenant

all and singular

any and all

....”

Reed Dickerson, in his *Fundamentals of Legal Drafting* (2d ed, Little, Brown, 1986), p 208, agrees that the drafter should avoid “any and all” and similar pairs one of which includes the other. The drafter “should use the broader or narrower term as the substance requires.” *Id.*

Still other commentators have called for the abandonment of “any and all.” In Squires and Mucklestone, *A Simple “Simple” Will*, 57 Wash L R 461 (1982), the authors set forth a guide for wills that is simple in form yet sophisticated in substance. “The authors attempted to avoid both unneeded precision and vagueness and instead attempted to make statements general whenever possible.” *Id.*, p 463. This article includes a list of recurring phrases that can be consistently shortened or simplified. And the list includes a phrase that we have come to know quite well.

Unrevised Phrases and Words

in respect to, of
any and all
all or any part
in the event that
aforesaid

Revised To

to
all
any
if
[omit or specify]

Unrevised Phrases and Words

to make any such distributions provided that property of every kind and character said, such, same expiration

Revised To

to distribute if any property [omit] end

Despite all of this advice, "any and all" finds its way into lawyers' speech, memorandums, briefs, and opinions, and most often into insurance and indemnification contracts.

The Michigan Supreme Court seemed to approve our dictionary definitions of "any" in *Harrington v Interstate Business Men's Accident Ass'n*, 210 Mich 327, 330; 178 NW 19 (1920), when it quoted *Hopkins v Sanders*, 172 Mich 227; 137 NW 709 (1912). The Court defined "any" like this:

"In broad language, it covers 'any final decree' in 'any suit at law or in chan-

cery' in 'any circuit court.' 'Any' means 'every,' 'each one of all.'"

In a later case, the Michigan Supreme Court again held that the use of "any" in an agency contract meant "all." In *Gibson v Agricultural Life Ins Co*, 282 Mich 282, 284; 276 NW 450 (1937), the clause in controversy read:

"14. The Company shall have, and is hereby given a first lien upon any commissions or renewals as security for any claim due or to become due to the Company from said Agent." (Emphasis added.)

The *Gibson* court was not persuaded by the plaintiff's insistence that the word "any" meant less than "all":

"Giving the wording of paragraph 14 of the agency contract its plain and unequivocal meaning, upon arriving at the conclusion that the sensible connotation of the word 'any' implies 'all' and

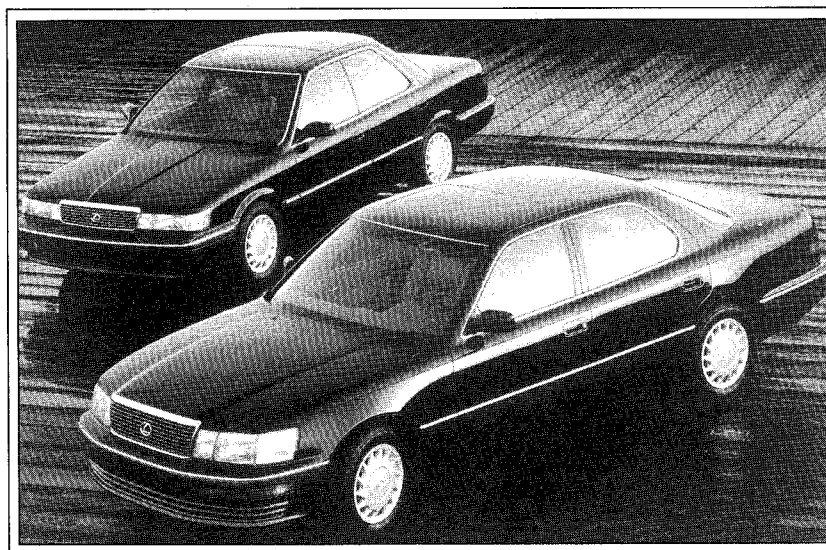
not 'some,' the legal conclusion follows that the defendant is entitled to retain the earned renewal commissions arising from its agency contract with Gibson and cannot be held legally liable for same in this action." *Gibson* at 287 (quoting the trial court opinion).

The Michigan Court of Appeals has similarly interpreted the word "any" as used in a Michigan statute. In *McGrath v Clark*, 89 Mich App 194; 280 NW2d 480 (1979), the plaintiff accepted defendant's offer of judgment. The offer said nothing about prejudgment interest. The statute the Court examined was MCL 600.6013; MSA 27A.6013:

"Interest shall be allowed on any money judgment recovered in a civil action...."

The Court held that "the word 'any' is to be considered all-inclusive," so the defendants were entitled to interest. *McGrath* at 197.

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Recently, the Court has again held that “[a]ny means ‘every,’ ‘each one of all,’ and is unlimited in its scope.” *Parker v Nationwide Mutual Ins Co*, 188 Mich App 354, 356; 470 NW2d 416 (1991) (quoting *Harrington v Interstate Men’s Accident Ass’n*, *supra*).

On the other hand, at least one panel has held that “any” as used in an indemnification contract was wanting for vagueness. In *Geurink v Herlihy Mid-Continent Co*, 5 Mich App 154, 156-157; 146 NW2d 111 (1967), an indemnification contract contained the following language:

“The subcontractor hereby waives and releases the general contractor from all liability for injuries to persons and damages to and loss of property which the subcontractor may suffer or sustain in performance of this subcontract, or in connection herewith; and the subcontractor hereby agrees and covenants to indemnify and hold harmless the general contractor from all liability, claims, demands, causes of action and judgments arising by reason of any personal injuries or loss and damage to property suffered by or sustained by any of the subcontractor’s employees” (Emphasis added.)

The issue the Court faced was the liability of the general contractor for its own negligence. “The appellant [general contractor] places great emphasis on the broad language ‘any’ damage or injury suffered ‘on’ the site of the work.” *Geurink* at 158.

The *Geurink* court held that the broad all-inclusive language used in the contract did not insulate the general contractor because it did not specifically mention the general contractor’s liability for its own negligence. It was not clear that the parties agreed to this type of indemnification.

It is doubtful, however, that using “any and all” instead of “any” would have affected the outcome of this case. It certainly would not have made this particular clause any more specific.

Moreover, the Court of Appeals seemed to change its mind in *Paquin v Proksch Construction Co*, 113 Mich App 43; 317 NW2d 279 (1982). In *Paquin*, the contract again rolled out the doublets:

“The Contractor shall . . . indemnify and hold harmless the Owner . . . from and against any and all claim or claims arising out of the Work performed by the Contractor or any subcontractor; also, the Contractor shall pay, liquidate and discharge any and all claims or demands for bodily injury . . . alleged or claimed to have been caused by, grown out of or incidental to the performance of the Work performed by the Contractor or any subcontractor” *Paquin* at 280. (Emphasis added.)

An injury occurred to the contractor’s employee when an owner’s employee negligently moved an overhead crane, crushing the man’s fingers.

The *Paquin* court noted: “The indemnity provisions in the case at bar make abundant use of the words ‘any’ and ‘all’ and of the phrase ‘any and all’ in describing the claims to which the provision applies.” *Paquin* at 50. In holding for the indemnified owner, the Court chose not to follow *Geurink*, *supra*, stating that there could be no broader classification than the word “all,” and that in its ordinary meaning, the word “all” leaves no room for exceptions. *Paquin*, p 50 [quoting *Pritts v J I Case Co*, 108 Mich App 22, 30; 310 NW2d 261 (1981)].

There’s no reason to think that “any and all” made the difference. The lesson of these two cases is not that “any and all” has an advantage over “any,” but that on rare occasions either word may be too vague to convey the parties’ intentions.

One final example. In *Karl v Bryant Air Conditioning Co*, 416 Mich 558; 331 NW2d 456 (1982), the Michigan Su-

preme Court was asked by the United States Court of Appeals for the Sixth Circuit to certify three questions of law. Among the issues was whether the legislature intended that MCL 600.2949; MSA 27A.2949 (comparative negligence statute) apply to products liability actions sounding in implied warranty.

“Section 2949. (1) In all products liability actions . . . , the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or the plaintiff’s legal representatives, but damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.” (Emphasis in opinion.)

“Section 2945. As used in sections 2946 to 2949 and section 5805, ‘products liability action’ means an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.” (Emphasis in opinion.)

In both these statutes the legislature chose not to use “any and all,” but one or the other, to describe product liability actions.

The Court stated:

“In §2949, the operative language is ‘all products liability actions.’ This language is defined in §2945 as follows: “products liability action” means an action based on any legal or equitable theory of liability.’ It is difficult to imagine any language more all-inclusive.” *Karl* at 568.

And the Court held:

“We believe that the Legislature’s use of the words ‘all’ and ‘any’ require, without further interpretative inquiry, the construction that comparative negligence applies to all and any products liability actions, including those sounding in implied warranty.” *Karl* at 569. (Emphasis in original.)

David Elder is a recent graduate of Thomas Cooley Law School. He received his undergraduate degree from Ohio University.

Thus, the Court, in its certified answer to the Sixth Circuit, concluded that "all" meant "any." One word was enough.

Suppose that both statutes in *Karl* had used "all," or both had used "any." Any difference? It's hard to imagine why there would be.

Other state courts have defined "any" as synonymous with "every" and "all." For instance, in *Donohue v Zoning Board of Appeals*, 235 A2d 643 (Conn, 1967), the court said the word "any" has a diversity of meanings and may be employed to indicate "all" or "every" as well as "some" or "one." The list of cases using this definition of "any" is exhaustive and may be found in 3A

Words and Phrases (1991 Cum Supp), pp 23-27.

If all these authorities tell us that "any and all" is normally redundant, then why not substitute "any" or "all" as the context requires? See Figure 1. This is one little symbolic step that lawyers can take in reducing the doublets and triplets that continue to plague legal writing.

Perhaps the argument was best put in a quote the author found while looking for something else.

"Simplicity of character is no hindrance to subtlety of intellect." John Viscount Morley, *Life of Gladstone* (1903). ■

Figure 1—From Dickerson, *The Fundamentals of Legal Drafting* (2d ed, Little, Brown, 1986), p 217.

§9.5. "ANY," "EACH," "EVERY," ETC.

The draftsman should use adjectives such as "each," "every," "any," "all," "no," and "some" (technically known as "pronominal indefinite adjectives") only when necessary. If the subject of the sentence is plural, it is almost never necessary to use such an adjective (e.g., "Qualified state officers shall" rather than "All qualified state officers shall").

If the subject of the sentence is singular, the draftsman should use the pronominal indefinite only when the article "a" or "the" is inadequate, as when the use of "a" would allow the unintended interpretation that the obligation is to be discharged (or the privilege exhausted) by applying it to a single member of the class instead of to all of them. "Any" and "no" should be reserved for instances where the context would otherwise raise a significant doubt as to whether the draftsman intended to cover everyone in the described class.

If it is necessary to use a pronominal indefinite, he should follow these conventions:

- (1) If a right, privilege, or power is conferred, use "any" (e.g., "Any qualified state officer may").
- (2) If an obligation to act is imposed, use "each" (e.g., "Each qualified state officer shall").
- (3) If a right, privilege, or power is abridged, or an obligation to abstain from acting is imposed, use "no" (e.g., "No qualified state officer may").

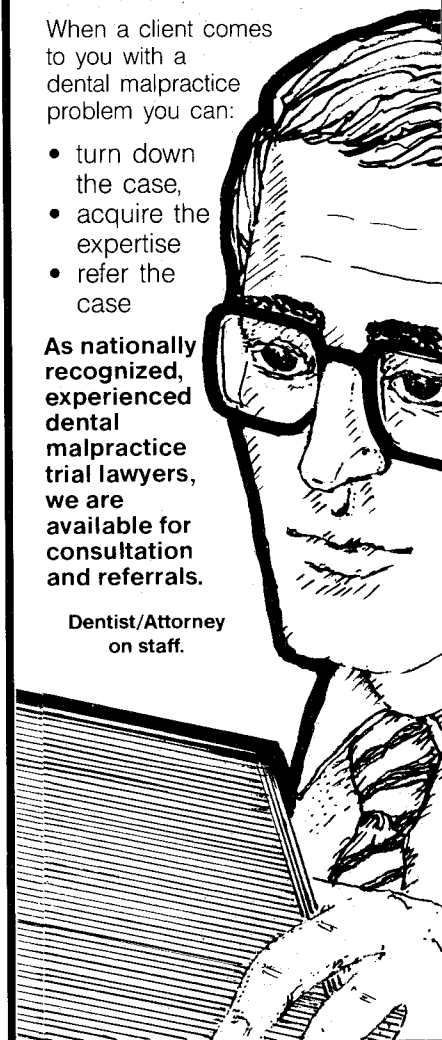
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