

To the Trashcan with And/Or

By Joseph Kimble



References

Kenneth A. Adams, *Legal Usage in Drafting Corporate Agreements* 110 (2001): "I try to avoid using *and/or* in my drafting and use instead *X or Y or both*, or, when more than three items are involved, *one or more of A, B, and C*."

Mark Adler, *Clarity for Lawyers: Effective Legal Writing* 125 (2d ed. 2007): "*A and/or B* may be shorthand for *A or B or both* but the saving is trivial. Too often the expression is a lazy alternative for the drafter who has not considered which option is appropriate: (A and B) or (A or B or both) or (A or B but not both)."

Scott J. Burnham, *Analyzing and Drafting Contracts* 97 (3d ed. 2003): "[Suppose that], in a will, a testator leaves a bequest to 'A and/or B.' Who gets the bequest? A number of commercial cases have arisen in which the agreement specified that one party would deliver 'A, B, and/or C' or 'A and/or B and/or C.' The possible combinations are so boggling that it's difficult to tell what was intended. On the other hand, a provision limiting liability 'in the event of destruction in the Atlantic and/or Pacific' states an impossibility when read with the conjunctive *and*. These provisions should be rewritten for clarity.... The bottom line on *and/or*? Its use is usually sloppy and careless. When you must clarify a several *and* or an inclusive *or*, spell it out. *Don't use and/or*."

Bryan A. Garner, *Legal Writing in Plain English* 112, 113 (2001): "Replace *and/or* wherever it appears.... About half the time, *and/or* really means *or*; about half the time it means *and*. All you have to do is examine the sentence closely and decide what you really mean.... The danger lurking behind *and/or* is that the adversarial reader can often give it a skewed reading.... Courts,

by the way, have routinely had extremely unkind words for those who use *and/or*. Don't give them cause for still more grumbling."

Thomas R. Haggard, *Legal Drafting: Process, Techniques, and Exercises* 257 (2003): "Since both *and* and *or* are potentially ambiguous, combining them into one term only multiplies the ambiguity. Because of this and the term's total lack of grace, *and/or* has been the subject of considerable judicial hostility."

David Mellinkoff, *Legal Writing: Sense and Nonsense* 55 (1982): "The high failure rate of legal papers that depend on *and/or* for anything of importance should have long since eliminated it from the legal vocabulary." ■

Editor's note: Because space is limited this month, the winner of the February "nouns" contest will be announced in May.

Joseph Kimble has taught legal writing for 25 years at Thomas M. Cooley Law School. He is the author of Lifting the Fog of Legalese: Essays on Plain Language, the editor in chief of The Scribes Journal of Legal Writing, the past president of the international organization Clarity, a founding director of the Center for Plain Language, and the drafting consultant on all federal court rules. He recently led the work of redrafting the Federal Rules of Civil Procedure.



"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. We seek to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain-English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For more information about plain English, see our website—www.michbar.org/generalinfo/plainenglish/.
