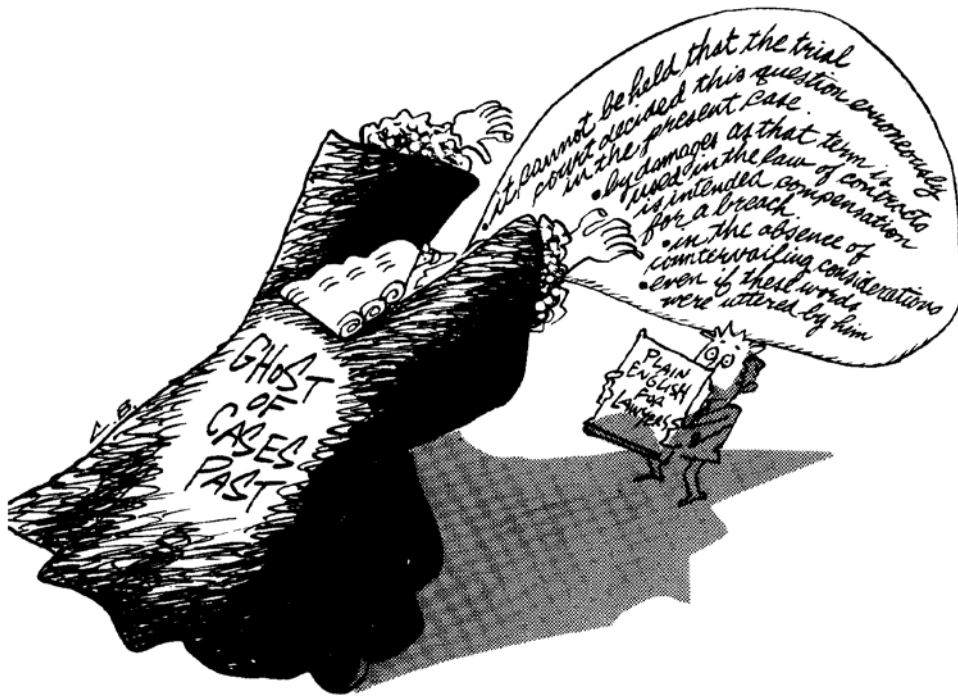


Ambiguity

By Richard Wydick

This month's column is in honor of my friend Richard Wydick, who died on May 11. His classic book Plain English for Lawyers, first published in 1979, has sold more than a million copies. The first article I ever published (with coauthor F. Georgann Wing) was in June 1986, in this column. Because it drew so heavily on Dick Wydick's book, it was accompanied by the drawing that we've reproduced for sentimental reasons (the drawing doesn't relate to ambiguity). What follows is a presentation he made at a conference of legal-writing teachers. —JK



As legal-research-and-writing teachers, you are a very lucky group, for two reasons. Number one: You have the privilege of teaching first-year law students. That's when they are the most fun, the most enthusiastic, the most ready to learn. Number two: You have the privilege of teaching them the two most useful skills in the entire curriculum—how to research the law,

and how to write the kinds of things lawyers write.

In teaching them research, you may send them off to the library with some exercises, such as this one: “In the bound volumes of West’s California Codes, find a statute that tells you the consequences of sneaking out of your hotel with your suitcase, without paying for last night’s dinner and this morning’s breakfast.”

When your students finally find that huge set of bluebooks, they will eventually come up with the California Penal Code section:

1. Any person who obtains any food, fuel, services, or accommodations at a hotel, inn, restaurant, boardinghouse, lodginghouse, apartment house, bungalow court, motel, marina, marine facility, autocamp, ski area, or public or private campground, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an hotel, inn, restaurant, boardinghouse, lodginghouse, apartment house, bungalow court, motel, marina, marine facility, autocamp, or public or private campground by the use of any false pretense, or who, after obtaining credit, food, fuel, services, or accommodations, at an hotel, inn, restaurant, boardinghouse, lodginghouse, apartment house, bungalow court, motel, marina, marine facility, autocamp, or public or private campground, absconds, or surreptitiously, or by force, menace, or threats, removes any part of his or her baggage therefrom with the intent not to pay for his or her food or accommodations is guilty of a public offense punishable as follows...¹

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Remember that the students who find this statute are very bright and very impressionable. This may be the first piece of real law they have ever seen. They may say, "So that's the way it's done here—that is how the law is written!"

If you could ever track down the lawyer who drafted that statute—and you know it was a lawyer, don't you?—you might ask that lawyer why he or she wrote it that way. The lawyer would reply something like this: "We lawyers must write in a way that avoids any possible ambiguity. We must write with precision so that our meaning is absolutely clear."

Avoiding ambiguity is a laudable goal—but most of the time, a lawyer can do it easily, without creating the kind of mess you see in Penal Code 537. Let's look at several common causes of ambiguity and how to avoid them.

Please read item 2:

2. News headline: First Aid Squad Helps Dog Bite Victim.²

The little ambiguity that makes item 2 laughable occurs in the words *dog* and *bite*. When you first read the headline, your mind treats *dog* as a noun and *bite* as a verb. But here the noun and verb function together as an adjective—to modify the noun *victim*. My friend Bryan Garner calls those *phrasal adjectives*: two or more words that function together as an adjective. To fix the ambiguity, all you need is a hyphen between *dog* and *bite*.

Bryan's handy rule of thumb is to always hyphenate phrasal adjectives. You can think of many other examples. For instance, *small business lobbyists* makes you think of wee little lobbyists. *Small business* needs a hyphen.

Now read item 3:

3. News headline: Demonstrators Rally for Peace in London.

The momentary ambiguity in item 3 is caused by the modifier *in London*. For a moment, at least, the reader can't tell what's happening in London. Is it more rioting in the streets? Or is it a peace rally?

You can avoid that kind of ambiguity with another handy rule of thumb: put the modifier as close as you can to the term you want to modify. So if it's a peace rally in London, you could say: "Demonstrators in London Rally for Peace."

You will see an example of the same thing in item 4:

4. Help Wanted: Stablehand to care for racehorse who does not smoke or drink.³

The modifier here is *who does not smoke or drink*. It belongs right after *stablehand*, rather than after *racehorse*. You might then add the word *wanted* before *to care for racehorse*.

Items 2, 3, and 4 don't create legal problems because they aren't in legal documents, and they are simple enough to spot quickly—that's why they make you chuckle rather than cringe.

But now read item 5:

5. If the shareholders do not approve the issuance of Class Two shares by August 31, the reorganization plan will be abandoned.⁴

The ambiguity here is what must happen "by August 31." Is it the shareholder approval, or is it the issuance of Class Two shares? If that sentence appeared in a contract or a proxy statement or some similar legal document, it could cause an expensive dispute.

Again, the ambiguity can be avoided by putting the modifier *by August 31* close to the term you want it to modify. If it's the shareholder approval, then you might revise the sentence to read: "If, by August 31, the shareholders do not approve, [etc.]"

Please read item 6:

6. The price adjustment clause cannot be invoked due to the increased cost of gasoline.

The ambiguity lies in putting the *due to* clause at the end of the sentence. One possible meaning is "An increase in the cost of gasoline is not grounds for invoking the price-adjustment clause." The second possible meaning is "Ordinarily you could invoke the price-adjustment clause, but the increased cost of gasoline prevents you from invoking it now."

If you wanted to express that second meaning without ambiguity, you could move the *due to* clause to the front of the sentence, like this: "Due to the increased cost of gasoline, the price-adjustment clause cannot be invoked."

The examples we've seen thus far have all been ambiguities caused by syntax—the way the words are put together to form a sentence. Those are called *syntactic ambiguities*.

Now we're going to look at a different type, called *semantic ambiguity*—ambiguity that's caused by a poor choice of words.

Please read item 7:

7. Free car wash. This coupon expires on August 26, 2011.

Today is August 26. Suppose you drive to the carwash with your little coupon in hand. Are you going to get a free car wash? Or is the car-wash guy going to say, "Your coupon expired today. Sorry." The semantic ambiguity lies in the little preposition *on*. It doesn't tell us whether the coupon expires at the beginning of August 26 or at the end of August 26.

Bearing in mind that the purpose of the coupon is to build good customer relations, you might pick a better preposition and make the statement positive rather than negative. For example, it could say: "Valid through August 26."

Now read item 8:

8. I bequeath the sum of \$2,000,000 to my nephew Fergus, provided that he abstains from using alcohol and/or addictive drugs until he is past eighteen years old.

Item 8 contains two semantic ambiguities. The first one is the term *and/or*. Let's

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suppose that nephew Fergus makes it to age 18, and he's never touched a drop of alcohol. But he's a hopeless crackhead. Do you think the rich uncle would want Fergus to get the money? Probably not. The rich uncle didn't mean *and/or*—he meant *and*. If a lawyer really needs to express both the conjunctive and the disjunctive, there's an easy way to do that without ambiguity. You say "A or B or both."

Here's an easy rule to teach your students: never, ever use the term *and/or*.

The second semantic ambiguity in item 8 is the expression *past eighteen years old*. When will Fergus be past 18?

- on his 18th birthday?
- the day after his 18th birthday?
- on his 19th birthday?

Chances are, the rich uncle never saw the problem when he read and signed the will. But his lawyer should have seen it. They could have avoided the semantic ambiguity by saying "until his 18th birthday."

Now read item 9 and do two things: (1) find the ambiguity, and (2) decide whether it is a semantic ambiguity (because of a poor choice of words) or a syntactic ambiguity (because of a poor arrangement of words).

9. The court may order the deponent to produce "any designated book, paper, document, record, recording, or other material not privileged."⁵

What you see in item 9 is one of the Federal Rules of Criminal Procedure before their revision. The ambiguity is syntactic because it's caused by the way the words are arranged in the sentence. The ambiguity lies

in the modifier at the end of the sentence: *not privileged*. The reader can't tell how far back in the sentence that modifier stretches. Does it stretch only to the last term, *other material*? Or does it stretch all the way back in the sentence, to apply to recordings, records, documents, papers, and books?

That's a very common kind of ambiguity—when you have a modifier before or after two or more items to which the modifier could be applied.

The original drafters of the Criminal-Procedure Rules were trying to limit discovery to nonprivileged material, no matter what its form. If you read item 10, you will see how the revisers of the rule solved the ambiguity. They simply moved the modifier to the front of the series:

10. The court may order the deponent to produce "any designated material that is not privileged, including any book, paper, document, record, recording, or data."⁶

Finally, please read item 11 and do two things: (1) find the ambiguity, and (2) find a quick and easy way to fix it.

11. Every student in the seminar must write three-page papers on each of the following topics: the relevance of "original intent," Chief Justice Roberts's judicial-restraint doctrine, the First Amendment and the right to die.

The ambiguity is this: How many three-page papers must a seminar student write? Is it four? Or is it only three?

In other words, does the student's third paper have to be about the First Amendment generally, covering freedom of speech, freedom of the press, freedom of religion, and

so forth? And then does the student have to write a fourth paper about the right to die? Or on the other hand, maybe the student has to write only three papers, the last one being about the right to die, as one aspect of the right to personal autonomy, as found in the penumbra of the First Amendment?

Some English teacher back in grammar school probably taught you that when you list a series of items, you must put a comma after each item, but that it is permissible to omit the comma after the next-to-last item if you wish.

That advice is okay for people whose writing will be confined to shopping lists and works of fiction. But it's bad advice for lawyers and other technical writers because occasionally eliminating the comma after the next-to-last item can create an ambiguity—as it does in item 11.

I suggest that you teach your legal-writing students to always use the comma after the next-to-last item in a series. The comma doesn't take much ink. It doesn't occupy much space. And it takes less time to put it in than to stop and ponder whether you could omit it without risking an ambiguity. ■

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Richard Wydick was an emeritus professor at U.C. Davis School of Law, where he began teaching in 1971. His million-seller Plain English for Lawyers is now in its fifth edition. His honors included the Golden Pen Award from the Legal Writing Institute and a Lifetime-Achievement Award from Scribes. For a tribute given at the Scribes event, go to the Fall 2010 edition of The Scrivener, www.scribes.org/#!the-scrivener/miegr. RIP, Dick.

ENDNOTES

1. Cal Penal Code 537(a).
2. Pinker, *The Language Instinct* (New York: William Morrow and Company, 1994), p 133.
3. Cf. *The Tonight Show* (NBC television broadcast, February 16, 2011).
4. See Adams, *A Manual of Style for Contract Drafting* (Chicago: ABA Publishing, 2d ed, 2008), p 220.
5. Former FR Crim P 15(a), cited in Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), p 122.
6. FR Crim P 15(a)(1).