

Revisiting the Writing Contests (on Ambiguity)

By Joseph Kimble

Over the years, I've put together a good many contests inviting readers to rewrite various sentences and promising books to the winners. All the contests were add-ons to full columns. Now I'd like to collect some of them into stand-alone columns, for several reasons.

First, if I do say so myself, they were pretty good—and instructive. Some were mini-essays. I think they're worth another look.

Second, even though readers could go back and dig them out, few readers will. They'll be buried forever.

July 2011 Contest

I'll send a free copy of *Lifting the Fog of Legalese* to the first three people—that's right, three winners—who send me an "A" revision of the sentence below. Send an e-mail to kimblej@cooley.edu. I have to be the sole judge of the winners.

The sentence is from the website of the Social Security Administration. You'll see that it presents the very ambiguity discussed in this month's column.

The SSI program pays benefits to people age 65 and older or blind or disabled adults under 65 who have limited income and resources.

Fix the ambiguity. If you want to, also explain your assumption about what modifies what.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 33 years. To contribute an article, contact Prof. Kimble at WMU-Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, Google "Plain Language column index."

Third, I can group them into topics that will deepen their value. I'll start below with three that tested readers on untangling syntactic ambiguity. They appeared in July–August 2011, September–October 2011, and January–February 2013. I tried to update the winners' position or firm as best I could.

A word of thanks to the scores of readers who have submitted entries since the contests began. More than a few times, you thought of a better version than I had in mind. So this column, even after 30 years, continues to be not only a labor of love but also an adventure in learning. ■

The Results

Last month, I asked you to fix the ambiguity in this sentence (which may have changed) from the website of the Social Security Administration:

The SSI program pays benefits to people age 65 and older or blind or disabled adults under 65 who have limited income and resources.

The central ambiguity is caused by the so-called trailing modifier, as discussed in last month's column. Everyone who entered spotted the trouble: does *who have limited income and resources* modify *people age 65 and older*? My check of the full website tells me that it does, but that's not the point. There's also uncertainty about whether a blind or disabled *child* can collect, and the website again says yes.

The intended meaning could be made clear in a number of ways—more, in fact, than I had imagined. I promised three winners, based mainly on the order in which I received the entries. Each winner gets a copy of *Lifting the Fog of Legalese: Essays on Plain Language*. But I'll also mention some other readers who submitted good fixes. Sorry that I can't acknowledge all the good ones.

Now, a vertical list is surefire:

The SSI program pays benefits to people who:

- (1) have limited income and resources; and
- (2) are blind, disabled, or age 65 and older.

You could even do that same thing in a normal sentence that repeats the *who*. I think a list makes for easier comprehension, but then again, how about this entry from Jeanne Jerow (one of the later ones)?

The SSI program pays benefits to people with limited income and resources who are blind, disabled, or over age 64.

At any rate, the first winner is Mark Malven, from the Dykema firm. He created a somewhat different vertical list from the one above. So did Brent Geers and Peter Katz.

The Results (continued)

The SSI program pays benefits to people who have limited income and resources, and are:

- (1) age 65 and older;
- (2) blind; or
- (3) disabled.

Two side points here. First, drafters might disagree on whether an *or* is needed after item #1. At least in the U.S., the tendency is to put *and* or *or* after the next-to-last item only. Second, I like to avoid a second level of breakdown in the list if I can. Thus, I'd prefer not to do something like the following, although it's often helpful with more complicated provisions:

The SSI program pays benefits to people:

- (1) who have limited income and resources; and
- (2) who are:
 - (a) age 65 and older;
 - (b) blind; or
 - (c) disabled.

The second winner is Scott Levinson, associate general counsel for Con Edison of New York, who fixed the ambiguity with a midsentence dash—one of the techniques mentioned in last month's column:

The SSI program pays benefits to people age 65 and older—or blind or disabled adults under 65—who have limited income and resources.

The third winner is James A. Smith, a retired partner of Bodman PLC, who assumed that the trailing modifier does not apply to *people age 65 and older*. He used two sentences, as did some other persons who made the same assumption:

The SSI program pays benefits to people 65 and older. SSI also pays blind or disabled adults under 65 who have limited income and resources.

Here again, a list would also work nicely, as demonstrated in revisions from Richard Swanson, Michelle Horvath, and Mary Hickey:

The SSI program pays benefits to:

- (1) people 65 and older; and
- (2) blind or disabled adults under 65 who have limited income and resources.

And Judge William Richards, now retired from the 46th District Court, was the first to note that repeating the *to* before *blind* in the original would point strongly toward this same meaning.

Finally, quite a few readers offered good revisions that used horizontal, rather than vertical, numbered lists. I think vertical lists are generally a bit more common and foolproof in drafting, but in this case the horizontal list works fine. Thus, this entry from Marguerite Donahue, taking us back to the first interpretation:

The SSI program pays benefits to people who have limited income and resources, and are (1) age 65 or older; (2) blind; or (3) disabled.

Stay tuned for a new contest next month. Where else can you have so much fun?

September 2011 Contest

I say "new" contest, but this one is similar to the last one (if you remember). It presents exactly the same kind of ambiguity. See whether you can identify it, send me your fix, and briefly explain your assumption. Here's the sentence:

Highway . . . includes . . . bridges, sidewalks, trailways, crosswalks, and culverts on the highway.

You might even recognize that beauty.

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Give it a try.

The Results

Last month, I invited you to identify the ambiguity in the sentence below, fix it, and explain your assumption. I promised a copy of *Lifting the Fog of Legalese* to the first two persons who submitted an "A" revision:

Highway . . . includes . . . bridges, sidewalks, trailways, crosswalks, and culverts on the highway.

Some of you may have recognized that the sentence is from MCL 691.1401(e). In fact, it's the subject of litigation that's pending (as I write this) in the Supreme Court.

Of course, the ambiguity is caused by the trailing modifier *on the highway*. Does it modify just *culverts* or all the items in the series?

The first winner is David Jarvis, a paralegal at Miller Canfield, who submitted this revision:

Highway . . . includes . . . the following if located on or under the surface of the highway: bridges, sidewalks, trailways, crosswalks, and culverts.

The second winner is Judge William Richards, now retired from the 46th District Court. He assumed a different interpretation and fixed the ambiguity with a vertical list using bullets (a much-neglected technique in legal writing and drafting).

The term 'highway' includes all the following:

- bridges;
- sidewalks;
- trailways;
- crosswalks; and
- culverts on the highway.

Next month's column will take another look at this example. In the meantime, notice the prepositional mess in the original. Culverts aren't "on" the highway, are they? Neither are bridges. Neither are sidewalks, really.

A final thought, or opinion: in cases like this, the doctrine of the last antecedent should play a small part, if any.

January 2013 Contest

Below is a sentence from an early draft of a rule. Notice the comma, which is inserted to avoid ambiguity. Admittedly, the meaning here probably wouldn't be mistaken even without the comma, but the pattern is a dangerous one. And it's better if you can just as easily avoid having too much hang on punctuation.

The court may impose a sanction only if the court finds that the failure was willful or in bad faith, and caused substantial prejudice in the litigation.

I'll send a copy of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* to the first two persons who send me an "A" revision. Send an e-mail to kimblej@cooley.edu.

Try it without using a numbered list. I'm a big fan of lists, but in this rule (for certain reasons) a list would not work well.

Programming note: the contest will return next year, after we finish this retrospective.

The Results

Last month, I invited readers to revise this sentence from an early draft of a court rule:

The court may impose a sanction only if the court finds that the failure was willful or in bad faith, and caused substantial prejudice in the litigation.

The comma here was inserted to avoid ambiguity—a cardinal sin in drafting. Probably the meaning would not be mistaken even without the comma, but (as I said) the *A or B and C* pattern is a dangerous one. And it's better if you can just as easily avoid having too much hang on punctuation.

I promised a copy of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* to the first two persons who sent me an "A" revision. I said to try it without using a numbered list. Although I'm a big fan of lists, a list would not easily fit in the place where this sentence goes.

The first winner is Scott Levinson, associate general counsel for Con Edison Company of New York, for this entry:

The court may impose a sanction only if the court finds that the failure caused substantial prejudice in the litigation and was willful or in bad faith.

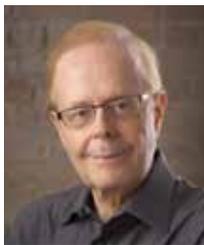
The second winner is David Porter, now an assistant attorney general in the Criminal Appeals Division. His revision was identical to Mr. Levinson's, except for adding the word *either* before *willful*.

I received a number of entries that, like these two, solved the ambiguity by putting the *caused substantial prejudice* piece first, but then omitted *in the litigation*. I think that omission may risk a substantive change. The same goes for omitting *the court finds that*, although I realize that both are arguably implicit.

I'm a little surprised that no one submitted an entry like this:

The court may impose a sanction only if the court finds that the failure was done willfully or in bad faith and caused substantial prejudice in the litigation.

I received a couple of entries that said *the court finds the failure . . .*. A gentle reminder: it's not good style to drop the word *that* after most verbs. *That* provides a useful joint in most sentences and often prevents a possible miscue. In our example, for instance, you don't know whether the sentence (without *that*) is going to read "the court finds the failure was willful" or "the court finds the failure to be willful." In the second example, you would stumble if you mentally inserted *that*.



Joseph Kimble taught legal writing for 30 years at WMU–Cooley Law School. His third and latest book is Seeing Through Legalese: More Essays on Plain Language. He is senior editor of The Scribes Journal of Legal Writing, editor of the "Redlines" column in Judicature, a past president of the international organization Clarity, and a drafting consultant on all federal court rules. He

led the work of redrafting the Federal Rules of Civil Procedure and Federal Rules of Evidence. Follow him on Twitter @ProfJoeKimble.