

AVOIDING INARTFUL DRAFTING

A Discussion of Common Mistakes in Drafting and Editing

I. The Reality of Legislative Drafting and Editing

A Case of Inartful Drafting. The Affordable Care Act contains more than a few examples of inartful drafting... To cite just one, the Act creates three separate Section 1563s... Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process"... And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement... As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.

King v. Burwell, 192 L. Ed. 2d 483, 497 (2015).

Behind-the-Scenes Reality. Often times, legislative staff are overwhelmed with the number of bill and amendment drafts that are requested at peak times during a session. The drafts have to be composed, reviewed for legal issues, reviewed for grammatical issues and errors, edited, and finalized. The time allocated for this process can be controlled by outside parties and can range from days to minutes.

Practice Tip. Allocate a certain amount of time to set aside a draft before finalizing it. During that time, take a break or work on something else. Come back to the draft with "fresh eyes" to see if there are any mistakes or different considerations.

II. Select Statutory Construction Principles

The Meaning of Terms

Terms of Art. [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952).

Ordinary Meaning. In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.

FDIC v. Meyer, 510 U.S. 471, 476 (1994).

Dictionary Meaning Caveat. Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.”... Ordinarily, a word’s usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.

Yates v. United States, 135 S. Ct. 1074, 1081-82 (2015).

Meaning as a Whole. Anyway, we “must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”

King v. Burwell, 192 L. Ed. 2d 483, 497-98 (2015) (quoting *Utility Air Regulatory Group*, 134 S. Ct. 2427, 2441 (2014)).

Practice Tip. Do not forget to check and see if the term is defined in another part of the code. Some codes have a definition section at the very beginning of the code. Other codes have a definition section in each title or part. Check the entirety of the code to see if the term is defined. If it is defined elsewhere, a court might apply that definition. Also, do not use two different terms that have the same meaning. Choose one term and remain consistent throughout the draft. Ensure that consistent terms are used throughout the applicable part of the code.

“And” versus “Or”

“And”. Generally, use of the conjunctive “and” in a list means that all of the listed requirements must be satisfied.

See, e.g., Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1292 (D. N. Mex. 1996).

“Or”. Generally, use of the disjunctive “or” means that only one of the listed requirements needs to be satisfied.

See, e.g., Zorich v. Long Beach Fire and Ambulance Serv., 118 F.3d 682, 684 (9th Cir. 1997); *United States v. O’Driscoll*, 761 F.2d 589, 597-98 (10th Cir. 1985).

Exception. Normally, of course, “or” is to be accepted for its disjunctive connotation, and not as a word interchangeable with “and”. But this canon is not

inexorable, for sometimes a strict grammatical construction will frustrate legislative intent. That, we are convinced, is precisely what will occur here unless “or” is read as “and”.

United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979).

“Shall” versus “May”

“Shall”. [T]he mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion.

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

“May”. The use of a permissive verb — “may review” instead of “shall review” — suggests a discretionary rather than mandatory review process.”

Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 23 (2d Cir. 1986).

Exception. The defendant “shall” be dealt with in a stated way; it is the language of command, a test significant, though not controlling... Doubt, however, is dispelled when we pass from the words alone to a view of [the statute’s] ends and aims.

See, e.g., Escoe v. Zerbst, 295 U.S. 490, 493 (1935).

Every Word Should Add Meaning

It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.

Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

Nothing here indicates that Congress, when it provided these two terms, intended that they be understood to be redundant. We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.

Bailey v. United States, 516 U.S. 137, 146 (1995).

Practice Tip. When reviewing a draft, be sure that every word is necessary to the intended meaning. If a word is not necessary, exclude it. Avoid doublets and triplets when the words in each are repetitive and add no additional meaning to

the draft. Examples of doublets include “any and all”, “by and between”, “known and described as”, “shall and will”, and “unless and until”. Examples of triplets include “name, constitute, and appoint”, “possession, custody, and control”, and “form, manner, and method”.

Bryan A. Garner, *The Redbook: A Manual on Legal Style* 219-22 (3rd ed. 2013).

III. Judicial Considerations

Canons of Construction

In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there... When the words of a statute are unambiguous, then, this first canon is also the last: “judicial inquiry is complete.”

Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

Even if this canon of construction were applicable to this case, our result would be the same... we have consistently refused to apply such a canon of construction when application would be tantamount to a formalistic disregard of congressional intent.... A canon of construction is not a license to disregard clear expressions of... congressional intent... In the present case, congressional intent is clear from the face of the statute and its legislative history

Rice v. Rehner, 463 U.S. 713, 732-33 (1983).

Presumption Favoring Continuation of Existing Law or Interpretation

The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl Protection, 474 U.S. 494, 501 (1986) (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)).

Practice Tip. Always check cross-references. If the language in the draft is meant to override another part of the code, then specifically reference that other part of the code. You might also consider inclusion of a cross-reference in that other part of the code.

Plain Meaning Rule

It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms... Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Caminetti v. United States, 242 U.S. 470, 485 (1917).

“Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”

Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)).

[W]here, as here, the statute’s language is plain, “the sole function of the courts is to enforce it according to its terms.”

United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

The plain meaning of legislation should be conclusive, except in the “rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”

United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982)).

IV. Miscellaneous

“Individual” versus “Person”

Normally, a drafter should use “individual” to refer to a living human being and should use “person” to refer to living human beings and entities.

Lawrence E. Filson, *The Legislative Drafter’s Desk Reference* (Congressional Quarterly Inc., 1992).

Practice Tip. Review any definition section that will affect your draft. Some codes have multiple definitions for “person”. For example, “person” is defined differently in numerous parts throughout Tennessee Code Annotated.

“Notwithstanding Any Other Provision of Law”

We have repeatedly held that the phrase “notwithstanding any other law” is not always construed literally...Congress did not intend the phrase “notwithstanding any other law” to require the agency to disregard all otherwise applicable laws.

Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 796 (9th Cir. 1996).

Practice Tip. Because courts presume that the legislature knows the current state of the law, courts also presume that the legislature knows specifically which provisions of law are affected by the “notwithstanding any other provision of law to the contrary” language. To avoid unintended court interpretations, it is better to specifically reference the provisions of law that are being overridden. Additionally, use cross-references and pinpoint cites instead of broad terms, such as “herein”, “hereinafter”, “above”, or “below”.

Last Antecedent Rule

The Third Circuit’s reading disregards--indeed, is precisely contrary to--the grammatical “rule of the last antecedent,” according to which a limiting clause or phrase... should ordinarily be read as modifying only the noun or phrase that it immediately follows... While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, we have said that construing a statute in accord with the rule is “quite sensible as a matter of grammar.”

Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (quoting *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993)).

Applying the rule of the last antecedent here would require us to accept two unlikely premises: that Congress employed the singular “element” to encompass two distinct concepts, and that it adopted [an] awkward construction... Moreover,... the last-antecedent rule would render [a] word superfluous.

United States v. Hayes, 555 U.S. 415, 425 (2009).

Practice Tip. When modifying clauses are used in a draft, think about whether they could subject the text to multiple interpretations. If more than one interpretation can be found, alter the language to be more direct. Also check for other modifiers, such as adjectives and adverbs, to see if their inclusion in the draft will create different interpretations.

Penalties or Causes of Actions for Engaging in Prohibited Conduct

If a draft provides that certain conduct is prohibited, check to make sure that a penalty is specified. If a draft provides that certain conduct is a criminal offense, then also make sure to designate the classification of the offense. Some codes may have default classifications when a criminal offense statute does not specify a classification. For example, in Tennessee, an undesignated felony offense is a Class E felony and an undesignated misdemeanor offense is a Class A misdemeanor. Tenn. Code Ann. § 40-35-110(b) and (d).

Practice Tip. When your client requests legislation seeking to prohibit certain conduct, be sure to inquire as to what consequences the client would want for engaging in the prohibited conduct. Some clients may prefer a cause of action instead of creating a criminal offense due to fiscal implications.

V. Common Complaints about Legislation

Long Sentences

Example. Every gift, grant, conveyance of lands, tenements, hereditaments, goods, or chattels, or of any rent, common or profit out of the same, by writing or otherwise; and every bond, suit, judgment, or execution, had or made and contrived, of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures; or to defraud or to deceive those who shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity out of them, shall be deemed and taken, only as against the person, such person's heirs, successors, executors, administrators, and assigns, whose debts, suits, demands, estates, or interest, by such guileful and covinous practices, shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, of any other matter or thing, to the contrary notwithstanding. Tenn. Code Ann. § 66-3-101.

Practice Tip. When revising a long sentence, review each word to ensure that every word adds meaning to the sentence. If there are any doublets, triplets, or unnecessary words, eliminate them. If a string of words is consistently used throughout the sentence, consider creating a defined term for that string of words.

Lack of Common Language

Legalese. Legalese often makes a statute more difficult for people to understand and offers little or no additional substance to the intended meaning. Legalese can also create ambiguity and generate litigation. Examples of legalese include

“aforementioned”, “aforesaid”, “antecedent to”, “henceforth”, “heretofore”, “herein”, and “therein”.

Practice Tip. Use simple and straightforward phrases. The following are a few examples of substitute words for longer phrases.

Use “when” instead of “at the time when”.

Use “while” instead of “during such time as”.

Use “so” instead of “in order that”.

Use “if” instead of “in the event that”.

Use “until” instead of “until such time as”.

Use “under” instead of “under the provisions of”.

Use “about” or “regarding” instead of “with regard to”.

Use “with” instead of “in conjunction with”.

Bryan A. Garner, *The Redbook: A Manual on Legal Style* 219-22 (3rd ed. 2013).

Overcomplicated Sentence Structure

Practice Tip. Use the active voice as much as possible. This helps to identify the actor responsible for performing the duty or conduct. This also helps to shorten the sentence. Often times, changing a sentence from passive voice to active voice will highlight ambiguity issues.

Example. If the sentence reads “The form shall be filed with the court in accordance with this section within thirty days of receipt of notification.”, consider rewriting the sentence in the active voice to clearly identify the actor. Therefore, the sentence would read “The defendant shall file the form with the court in accordance with this section within thirty days of receipt of notification.”.

When time is limited, remember the following three principles when drafting and editing: simplicity, clarity, and consistency. Do the best you can with the time you are given.

Jamie Shanks
Legislative Attorney
Tennessee General Assembly
Office of Legal Services
G-10, War Memorial Building
Nashville, Tennessee 37243
jamie.shanks@capitol.tn.gov
(615) 741-7531

1 EXERCISE 1

2
3 AN ACT to amend Tennessee Code Annotated,
4 Section 62-3-124, relative to professions.

5
6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

7
8 SECTION 1. Tennessee Code Annotated, Section 62-3-124, is amended by deleting the section
9 and substituting instead the following:

10
11 (a) The board shall issue a certificate of registration as a barber instructor to an applicant who:

12 (1) Files an application with the board in the form, manner, and method that the board
13 may prescribe, accompanied by the examination fee required by § 62-3-129;

14 (2) Holds a certificate of registration as a master barber and has been registered as a
15 master barber for a period of at least three (3) years;

16 (3) Has completed the twelfth grade in an accredited school or the equivalent;

17 (4) Files an application with the board in a form prescribed by the board, accompanied
18 by the examination fee required by § 62-3-129;

19 (5) Has completed a four hundred fifty-hour instructor training program at a board-
20 certified barber school;

21 (6) Has successfully completed the twelfth grade in an accredited school or the
22 equivalent; or

23 (7) Successfully completes an examination prescribed by the board.
24

25 (b) After registration, each barber instructor shall biannually submit to the board satisfactory
26 proof of attendance in a barber instructor training program of at least sixteen (16) hours' duration,
27 approved by the board; however, the board may, in its discretion, grant up to one (1) additional
28 year for submission of such proof when an instructor satisfactorily demonstrates a medical
29 hardship, a death in the immediate family, or entitlement to automatic renewal of registration
30 under § 62-3-120.
31

32 (c) A certificate of registration as a barber instructor shall and will become invalid if the
33 applicant:

34 (1) Ceases to hold a valid certificate of registration as a master barber;

35 (2) Fails to comply with subsection (b).
36

37 (d) The board may issue a certificate of registration as a barber instructor assistant to a person
38 who:

39 (1) Files an application with the board in the form that the board may prescribe,
40 accompanied by the fee required by § 62-3-129;

41 (2) Holds a valid registration as a master barber and is currently enrolled in a four
42 hundred fifty-hour instructor training program at a board-certified barber school; and/or

43 (3) Has completed the tenth grade in an accredited school or the equivalent.
44

45 SECTION 2. This act shall take affect July 1, 2015, the public welfare requiring it.

1 EXERCISE 2

2
3 AN ACT to amend Tennessee Code Annotated,
4 Title 39, relative to children.
5

6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:
7

8 SECTION 1. Tennessee Code Annotated, Section 39-15-403, is amended by deleting the section
9 and substituting instead the following:
10

11 (a) As used in this section, unless the context otherwise requires, “tattoo” means to intentionally
12 mark or color by pricking or inserting pigment or coloring matter into the skin so as to leave an
13 indelible mark or figure.
14

15 (b) Except as otherwise provided by law, it is an offense for a person to tattoo the skin of any
16 person under eighteen (18) years of age for a commercial purpose.
17

18 (c) It is an offense for a person to knowingly falsify a document for the purpose of obtaining
19 tattooing services for a minor.
20

21 SECTION 2. Tennessee Code Annotated, Section 62-38-211, is amended by deleting subsections
22 (c) and (d) and substituting instead the following:
23

24 (c) With the written consent of the parent or legal guardian, a minor sixteen (16) years of age or
25 older may be tattooed to cover up an existing tattoo. The parent or legal guardian must present
26 proof of guardianship or custody of the minor, must present an acknowledgement of receipt of a
27 report provided pursuant to subdivision (b)(2), and must be present during the procedure. For
28 purposes of this subsection, “proof of guardianship or custody” means a copy of an order of
29 guardianship, a decree for custody, a birth certificate, and any other form of proof of guardianship
30 or custody.
31

32 (d) No minor shall knowingly make a false statement or exhibit false identification to the effect
33 that the minor is eighteen (18) years of age or older to any person providing tattoo services for the
34 purpose of purchasing or obtaining such services. The person shall be punished by a fine of not
35 less than fifty dollars (\$50.00) nor more than two hundred fifty dollars (\$250) and not less than
36 twenty (24) hours of community service work; provided, such shall not be suspended or waived.
37

38 SECTION 3. Tennessee Code Annotated, Section 39-15-404(f), is amended by deleting the
39 subsection and substituting instead the following:
40

41 (f) Nothing herein shall be construed to affect §§ 57-10-101 and 57-10-102 in any way
42 whatsoever.
43

44 SECTION 3. This act shall take effect July 1, 2016, the public welfare requiring it.
45