

## Rules Online: Writing for Compliance

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- **Online reading**
  - More and more rules users do their *first* reading of rules text online. For many, online is their *only* access.
    - State Register as online only
    - Proposed rules made available on department Web sites
    - Fewer printed copies of Minnesota Rules with each edition.
      - Extracts are still important, though.
    - Screen reading has special challenges
    - Distractors
    - Orientation within the publication is more difficult, big-picture relationships less clear
    - All these factors make it more important than ever to work hard for legal clarity and readability. We'll focus on changes that help with both.
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### Ambiguity (ask: Which of two?)

- This morning: We talked about two types of problems that we can see when we look at words or phrases *even out of context*.

“sex offenders” (who is included?)

“light trucks” (which kind of *light*?)

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- **Ambiguity (ask: Which of two?)**
  - *Syntactic ambiguity*: seeing parts of sentences in relation to each other
  - “To my parents, Ayn Rand and God.”
  - “Two sisters reunited after 18 years at checkout counter.”

### ● Syntactic ambiguity

- The way the words interact:
- What parts do we attach to what other parts?
  - Mismatches between nouns and modifiers
  - Rule of last antecedent

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## Syntactic ambiguity

- Happens when there's doubt about how one word affects another. Usually involves *nouns* and *modifiers*.
  - Adjectives
  - Phrases that work like adjectives
  - Clauses that work like adjectives
- Occurs when you have two or more of one and only one of the other.

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## Adjective problems

- One noun, one adjective: it's clear what the adjective applies to.
- Two adjectives, one noun: it's not so clear.
  - "charitable and educational institutions"
    - Does this mean "charitable institutions and education institutions" or
    - "institutions that are both charitable and educational?"
    - Cure: draft in the singular "a charitable *or an* educational institution"

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## Adjective problems

"preadolescent boys and girls"

Does the adjective apply to both things or just the first?

Does this mean "preadolescent boys and preadolescent girls"?

Or does it mean all girls and boys with unchanged voices?

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## Mismatches of nouns and modifiers

- ▶ Acme may sell in the stores only *children's* apparel, accessories, and footwear.
  - Does that mean
- ▶ Acme may sell in the stores only *children's* apparel, *children's* accessories, and *children's* footwear.
  - Or does it mean
- ▶ Acme may sell in the stores only accessories, footwear, and *children's* apparel.

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## A Texas case:

- "[The] affidavit shall set forth specifically at least one **negligent** act, error, or omission claimed to exist...."
- The case turns on whether *negligent* modifies just "act" or all three words.

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- **A Minnesota example:**

- “It is a gross misdemeanor...to sell ...intoxicating liquor within 1000 feet of a **state** hospital, training school, reformatory, prison, or other institution under the supervision and control....of the commissioner of human services or the commissioner of corrections.”
- Does a county jail fall under this prohibition?
- Court said no, but the presence of **state** at the head of the list made it possible to make the other case.

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- **Special case: compounds with *non-***

- Avoid *non-* with noun strings. Don’t depend on hyphens.
- “non-agricultural homesteaded land”
- (The revisor’s stylebook will make this “nonagricultural...”)
- Does this mean “homesteaded but not agricultural” or “anything outside the ag homestead class”?

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- **Special case: series with *not***

- Problem language:
- Certain signs allowed “so long as they are **not** flashing, in the public right of way, obstructing vision at an intersection, or used more than three times per calendar year.”

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- **Special case: series with *not***

- Does *not* apply to the whole list?
- Drafter probably means “so long as the sign is **not** flashing, **not** in the public right of way, **not** obstructing vision, and **not** used more than three times per calendar year.”
- Another cure: a numbered series with **not** in the introductory language.

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- **Modifiers after a series**

- Prepositional phrases (“*in* the agreement,” “*under* the contract” )
- Participial phrases (phrases that begin with *-ing* words or *-ed* or *-en* words) rules **relating** to water quality standards
  - the amounts **allocated** to separate accounts
  - payments **based** on mortality or morbidity contingencies
  - drinks **shaken** but not stirred

### Ambiguity: two nouns, one phrase

- “Personal injury includes any infringement of copyright or improper use of slogans **in the insured’s advertising.**”
    - How far back does *in the insured’s advertising* apply? Does it modify both noun phrases?
    - Garner reports that a court held it only modifies *improper use of slogans*.
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### ● Two noun phrases, one prepositional phrase

- “Customer and Company (a) irrevocably consent to the jurisdiction of the United States District Court and the State courts **of New York...**”
  - Prepositional phrases are hard to see as *modifiers* when we think of them as integral to an idea.
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### ● Final modifiers: Rule of last antecedent

- Example:

“Commercial license requirements do not apply to buses, tractors, and trucks, with only four wheels and under three tons.”

- Using the rule:
  - The ambiguity is resolved by applying the modifier only to the *last antecedent* in the list.
  - Courts follow sometimes and ignore sometimes. Don’t rely on the rule! Move your modifiers.
  - Does a comma after the last item make a difference? Courts and commentators disagree.
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### ● Fixing a series: Making a final modifier apply to *all* the elements

- Turn the –ing phrase into a *clause*. Make all the elements subjects of the clause.
  - “A bus, tractor, or truck is not subject to commercial license requirements if it has only four wheels and weighs less than three tons.”
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### ● Fixing a series: Making a final modifier apply to the last element only

- Repeat a sentence element to show where the units are:

- “A person may not operate a motor vehicle *while wearing* headphones or *while using* earphones **on both ears.**”

(instead of “while wearing headphones or earphones on both ears”)

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- **An Illinois case...**

- “...any **fast food restaurant or restaurant facility** *whose principal food product is chicken on the bone, boneless chicken, or chicken sandwiches.*

- fast food restaurant—okay
  - fast food restaurant facility—not sure!
  - restaurant whose principal product is (etc.)—not sure!
  - restaurant facility whose principal product is—okay
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- **How to redraft?**

- Avoid having two nouns. Define *restaurant* so that it covers other facilities.
  - Repeat the article “a restaurant or a restaurant facility” AND
  - Put the modifiers in forms that can FOLLOW the nouns AND
  - Use a list form, which helps us see how modifiers attach.
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- **How to redraft**

- ...a restaurant or a restaurant facility that
  - (1) is a fast food operation, and
  - (2) has as its principal food product....
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- **Amendments or modifications:  
Watch where you insert!**

- “...greenhouses, sheds, and play structures erected before January 1, 2006”
  - What happens when the underscore is removed?
  - Solutions:
  - Add item to the list somewhere other than the end.
  - Letter or number items.
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- **Amendments or modifications:  
Watch where you insert!**
  - Underscoring can make intent clear, but underscoring will go away.
  - Always look at the result you get after the text is “cleaned.” Is it still clear?
  - Try drafting a version without marks that is clear, no matter how much you have to move. Then draft with marks to achieve that.
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- **When modifiers affect more words than you want them to**

You can avoid ambiguity in two ways:

- You can divide the sentence into marked parts, so that the tricky modifier only attaches to the right one, OR
  - You can rewrite the modifier as an if or when clause, OR
  - You can redraft the ideas in two or more sentences.
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- **A Canadian “comma dispute” that’s really a case of syntactic ambiguity.**

- [T]his agreement shall be effective from the date it is made and shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, **unless and until terminated by one year prior notice in writing by either party.**
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- **Dividing with letters or numbers**

- “This agreement shall:
  - (1) be effective from the date it is made;
  - (2) continue in force for a period of five years from the date it is made;
  - (2) continue after the first five-year period for successive five-year terms, unless and until terminated by one year prior notice in writing by either party.”
- 

- **Redrafting the ideas as separate sentences.**

- “This agreement shall be effective from the date it is made. It shall continue in force for a period of five years from the date it is made. It shall continue after this initial five-year period for successive five-year terms unless and until terminated. Either party may terminate the agreement by giving one year’s notice, in writing.”
  - (Does that really mean “written notice one year before the expiration of the current five-year term” or “written notice at any time”?)
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- **More syntactic ambiguity:  
A Minnesota Supreme Court case**

- ▶ Whoever harbors, conceals, aids or assists by word or acts another whom the actor knows or has reason to know has committed ~~a felony~~ **a crime...** may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than \$5000, or both if the crime committed or attempted by the other person is a felony.

- (Minn.Stat. 609.495, s 1)

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- **Shorter chunks to avoid ambiguity**

- ▶ A. This part applies to a person who harbors, conceals, aids, or assists by word or acts another whom the actor knows or has reason to know has committed a crime.
- ▶ B. This part applies when the crime committed or attempted by the other person is a felony.
- C. When this part applies, the actor may be sentenced to imprisonment for not more than three years, or a fine of not more than \$5000, or both

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- **Even shorter chunks, better order**

- This part applies when:
  - (1) a person has committed a crime;
  - (2) a second person has reason to know that the first has committed that crime;
  - (3) that second person harbors, conceals, aids, or assists the first [by word or acts]; and
  - (4) the original crime is a felony.

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- **Ways to split up sentences: applicability sections.**

- Complex information about the situation can go in a separate sentence by creating an applicability statement.
- “Subp. 1. This part governs vendors of...”
- “Parts 1234.5678 to 1234.5688 apply to vendors in the following situations: (list)”

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- **Ways to split up sentences: at the conjunctions**

- “If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney’s fees, it incurred as a result [and]. An offending party or attorney may also be held in contempt.”
- Put an exception into a new sentence with *But*
- “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required [except that]. But a party may assert the following defenses by motion...”

- **Shorter sentences and readability**

- Legal clarity isn't the *only* reason to write more, but shorter, sentences.
  - Longer sentences strain short-term memory and make reading more difficult.
  - Easier reading makes rules more user friendly for the people who have to comply.
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- **Turning sentences into lists**

- When you break a sentence into numbered or lettered parts, be careful of several things:
    - choosing the right conjunction
    - placing the breaks correctly
    - making sure all the items follow from the introductory language.
  - In unnumbered lists of short items, there are some special rules.
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- **Lists and scanability: rules online**

- Avoid long, continuous blocks of text.
  - Use short paragraphs
  - Use subheadings
  - Use lists.
    - Most Web guidelines call for bulleted lists.
    - Our form requirements call for numbers and letters.
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- **Choosing the right conjunction**

- The disability roll must include every person who
  - A. is blind;
  - B. is disabled; **or**
  - C. has reached the age of 65.

A person only has to satisfy one condition to be included.

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- **Choosing the right conjunction**

- The disability roll must include
  - A. every person who is blind
  - B. every person who is disabled, **AND**

- C. every person who has reached the age of 65.
  - List says the same thing as before but needs a different conjunction.
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- **Using lead-in language to support your conjunctions**

- Include an expression like
  - “at least one of the conditions it items A to D” (with OR)
  - or “all of the conditions in items A to D” (with AND) to help avoid misreadings.
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- **Deciding where to break:  
an example with *conditions* in combination**

- If- statements
  - And their opposites, unless statements
  - When-statements
  - And related until statements
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- **Multiple conditions, *and* and *or***

What does this mean?

“If a client is receiving alimony **or** is receiving child support **and** has been divorced for more than one year, then this section does not apply.”

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- **Which does it mean?**

- This section does not apply if the client:
    - (1) is receiving either alimony or child support; and
    - (2) has been divorced for more than one year.
  - This section does not apply if the client:
    - (1) is receiving alimony; or
    - (2) is receiving child support and has been divorced for more than one year.
  - Introductory language: does it work with all your items?
- 

**Items need to work logically with the lead-in:**

- If “Temporary signs must meet the following criteria, ” it looks as though all the signs must meet all the criteria, so that the list can’t include subtypes of temporary signs.

- Introductory language: does it work with all your items?
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- **Keep the listed parts grammatically parallel.**

- “The motion must:
    - (1) be in writing;
    - (2) state with particularity the grounds for seeking the order; and
    - (3) state the relief sought.”
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- **Problems with unnumbered lists:  
what the courts have said**

- The problems English has with lists are the basis for several rules of statutory construction.
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- **Know some rules of  
statutory construction**

- Rules that help courts to interpret law
  - Three rules about certain word patterns:
    - *Expressio unius est exclusio alterius.*
      - The expression of one is the exclusion of the other
    - *Noscitur a sociis*
      - It is known by its neighbors
    - *Ejusdem generis*
      - Of the same kind
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- **Expressio unius....**

- “List it or lose it.”
  - If you list things, anything not listed is out.
  - If you list “recipients of medical assistance, general assistance, and general assistance medical care” you don’t mean any other types of assistance.
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- **That’s why we sometimes....**

- Create long, wordy lists

- Use “including, but not limited to”—a problem in rules!
  - Use endings like “or other items that (and specify what they do)
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- **Ejusdem generis**

- Applies to general language at the end of a list.
  - Codified at Minn. Stats. 645.08:
  - “General words are construed to be restricted by preceding particular words.”
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- **Ejusdem generis**

- Example:
  - “ A disinfection treatment must ensure uninterrupted effluent treatment in the event of **electrical power failure, primary system failure, or other similar events** that would cause treatment interruptions.”
  - Would an earthquake be covered by “other similar events”? The courts relied on *ejusdem generis* to say no.
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- **Noscitur a sociis**

- We determine the *boundaries* of one word from the other words listed with it.
  - Case: A gun is in a purse. Is it “contained in a closed and fastened *case*, gunbox, or securely tied package”?
  - That is, does *case* encompass *purse*? The canon says that the court can be guided by the accompanying words.
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- **Lists of examples: a warning**

- An instance from water quality standards.
    - A definition explains what a BCC is.
    - A list shows which chemicals are BCCs.
    - The lists helps the reader, but it confuses the legal standard.
    - Which do you use to decide if something is a BCC?
    - Include a provision to say which governs.
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- **Compliance and word choice**

- Early readability research (back in the '80s) showed that people understood and remembered requirements better when they were rewritten to describe actions with verbs.
- That style is called verbal style, as opposed to nominal style.

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- **Avoiding nominal style:  
What is nominalization?**

- **The verb can be**

- *determine*
- *resolve*
- *apply*
- *enforce*

- **made into the noun....**

- *determination*
- *resolution*
- *application*
- *enforcement*

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- **More nominalizations**

- **The adjective can be**

- *enforceable*
- *distinguishable*
- *applicable*
- *specific*

- **made into the noun**

- *enforceability*
- *distinguishability*
- *applicability*
- *specificity*

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- **Avoiding nominal style**

- Wordy, stiff, abstract

▶ in the event of **discovery** by a person that...

- ▶ In the board's **discussion** of **the employment** of additional workers...
  - ▶ During a police **investigation** of the funds **diverted by embezzlement**...
  - Shorter, more concrete
  - if a person **discovers** that...
  - When the board **discussed hiring** more workers...
  - When the police **investigate embezzled** funds...
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#### **What you can do: A review**

To make rules easier to interpret and to read:

- Be aware of the potential for vagueness.
  - Keep displayed pieces short
    - short parts
    - short subparts
    - short sentences
    - lists and chunking
  - Use clear and simple language
    - no more technical than necessary
    - middle style
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- **Clear and simple: what's possible?**
  - Shorter parts. More parts.
  - Shorter sentences. More sentences.
  - Chunking information within long sentences. Lists.
  - Words as familiar as possible.
  - Verbal rather than nominal style.
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#### **To learn more about clear drafting:**

Chapter 10 of the bill drafting manual  
Adams, *A Manual of Style for Contract Drafting*.  
Charrow, Erhardt, and Charrow, *Clear and Effective Legal Drafting*.  
Dickerson, *Fundamentals of Legal Drafting*.  
Child, *Drafting Legal Documents*.  
Garner, *Legal Writing in Plain English*.